No._____

IN THE SUPREME COURT OF THE UNITED STATES

GUY KEVIN ROWLAND,

Petitioner -Appellant,

V

s.

KEVIN CHAPPELL, Warden

Respondent-Appellee.

**APPENDIX TO PETITION FOR WRIT OF CERTIORARI**

**CAPITAL CASE**

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**FOR PUBLICATION**

# UNITED STATES COURT OF APPEALS
# FOR THE NINTH CIRCUIT

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| GUY KEVIN ROWLAND,<br>*Petitioner-Appellant,*<br><br>v.<br><br>KEVIN CHAPPELL, Warden,<br>*Respondent-Appellee.* | No. 12-99004<br><br>D.C. No.<br>3:94-cv-03037-<br>WHA<br><br>OPINION |

Appeal from the United States District Court
for the Northern District of California
William Alsup, District Judge, Presiding

Argued and Submitted October 4, 2017
Seattle, Washington

Filed December 6, 2017

Before: Kim McLane Wardlaw, Richard R. Clifton, and John B. Owens, Circuit Judges.

Opinion by Judge Owens

## SUMMARY*

### Habeas Corpus/Death Penalty

The panel affirmed the district court's denial of California state prisoner Guy Kevin Rowland's 28 U.S.C. § 2254 habeas corpus petition challenging his conviction for first degree murder and rape and his capital sentence.

The panel rejected Rowland's contention that AEDPA, and its highly deferential standard, does not apply to his case because he filed a request for appointment of counsel and a stay of execution before AEDPA's effective date.

The panel held that Rowland's trial attorneys were deficient by retaining a psychiatrist for the penalty phase only a few days before its start and by failing to prepare him adequately, and it would be unreasonable for the California Supreme Court to conclude otherwise. Under AEDPA's highly deferential standard of review, the panel held that the California Supreme Court could have reasonably concluded that Rowland was not prejudiced.

The panel held that the California Supreme Court reasonably decided that Rowland's counsel's failure to call as a witness at the penalty phase the woman to whom Rowland confessed did not amount to deficient performance, and that even if counsel's performance was deficient, the California Supreme Court reasonably decided that Rowland had not shown prejudice.

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

The panel wrote that two statements by the prosecutor at the penalty-phase closing argument were inappropriate, but that, applying AEDPA's extreme deference, the California Supreme Court reasonably determined that neither statement violated Rowland's constitutional rights.

The panel held that the California Supreme Court's rejection of Rowland's non-concurrent representation conflict claim was neither contrary to, nor an unreasonable application of, established federal law. The panel wrote that even if successive representation could constitute an actual conflict under established federal law, Rowland has not demonstrated that any conflict due to his counsel's personal and professional relationship with a chief investigating officer significantly affected counsel's performance.

The panel declined to expand the certificate of appealability to include an unexhausted claim that systemic delay in the administration of California's death penalty renders executions arbitrary in violation of the Eighth Amendment.

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## COUNSEL

Joel Levine (argued), Costa Mesa, California; Michael Robert Levine (argued), Levine & McHenry LLC, Portland, Oregon; for Petitioner-Appellant.

Alice B. Lustre (argued), Deputy Attorney General; Glenn R. Pruden, Supervising Deputy Attorney General; Gerald A. Engler, Senior Assistant Attorney General; Xavier Becerra, Attorney General; Office of the Attorney General, San Francisco, California; for Respondent-Appellee.

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## OPINION

OWENS, Circuit Judge:

California state prisoner Guy Kevin Rowland appeals from the district court's denial of his 28 U.S.C. § 2254 habeas corpus petition challenging his conviction for first degree murder and rape and his capital sentence. We affirm.

## I. BACKGROUND

### A. Factual and Procedural History

On February 11, 1987, the State of California filed an amended information charging Rowland with one count of first degree murder (with the special circumstance that the murder took place during the commission of rape) and one count of rape. It alleged that Rowland had twelve prior felony convictions, and that he was on parole when he committed the offense.

On May 13, 1988, after the guilt phase of the trial, the jury convicted Rowland of both first degree murder and rape, and also found true the special circumstance allegation. On June 6, 1988, after the penalty phase, the jury returned a death sentence.

#### 1. Guilt Phase Evidence

Evidence at trial established that on March 16, 1986, Marion Geraldine ("Geri") Richardson went to the "Wild Idle" bar in Byron, Contra Costa County, California. Richardson lived in Byron with her mother and worked as a cook. She regularly snorted methamphetamine and evidently had some with her that night.

Rowland, who was twenty-four years old at the time, was also at the bar. Rowland socialized with Richardson for a while. According to an off-duty bartender, Rowland was "coming on" to Richardson, but she did not respond positively and seemed to be "trying to ignore" him.

Before 10 p.m., Rowland left the bar alone, driving away in his truck. Sometime later, Richardson told her friend that she was not feeling well, had a terrible headache, and needed to go home to get some sleep as she had to go to work early the next morning. Richardson left the bar alone in her car. Her car was later seen parked, empty and unlocked, at an odd angle about half a block from the bar.

In the hours that followed, Rowland brutally beat Richardson about the head, face, and elsewhere. He also raped her. According to expert testimony, Richardson had a bruise on her inner thigh which could have been caused by someone using a knee to force her legs part. Rowland also choked Richardson twice, killing her the second time. Before her death, Richardson ingested a potentially lethal dose of methamphetamine, which it appeared Rowland put in her mouth. Rowland then hauled Richardson's body in his truck to Half Moon Bay in San Mateo County, dragged her on the ground, and dumped her in the ocean.

The next morning, at about 7 a.m., Rowland went to the house of his lover, Susan Lanet, in Livermore. He looked disturbed and said he wanted to leave California. They shared some methamphetamine he had evidently taken from Richardson. Rowland soon admitted to Lanet that he had killed Richardson. He asked Lanet whether she wanted Richardson's belongings, including a ring and make-up. Lanet declined. Rowland then offered Lanet $20 to clean his truck and remove "[b]lood and every strand of hair." Lanet pretended to accept, but instead called the police. Shortly

thereafter, Rowland was arrested as he attempted to flee. At around 9:45 a.m., Richardson's body was found at the base of a cliff by Moss Beach near Half Moon Bay. Blood and other evidence in Rowland's truck tied him to Richardson's killing.

At the guilt phase of the trial, Rowland did not present any evidence, call any witnesses, or take the stand. His primary defense was that the evidence did not establish first degree murder or rape. The jury returned a guilty verdict.

### 2. Penalty Phase Evidence

During the penalty phase of the trial, the State offered in aggravation: (1) the circumstances of Rowland's crimes committed against Richardson (for which it relied on the evidence already provided during the guilt phase); (2) Rowland's extensive prior violent criminal activity; and (3) Rowland's prior felony convictions.

As the State demonstrated to the jury, Rowland had an egregious history of violence towards women:

- On April 4, 1978, Rowland entered the home of a sixty-three-year-old woman, whom he battered while he attempted to escape. She suffered a crushed vertebra and was hospitalized for eleven days.

- On October 4, 1980, Rowland lured a twenty-six-year-old woman out of a bar to a park with an offer to share cocaine, and then assaulted, battered, and raped her.

- On November 7, 1980, Rowland, together with a male partner, kidnapped two thirteen-year-old girls, whom they lured into a truck with a false offer of a

ride. One girl escaped, but the two men raped the other girl multiple times. Rowland helped his partner rape the girl twice. Rowland himself raped her six times, caused her to orally copulate him, sodomized her twice, and fondled her. During the attack, he repeatedly threatened to kill the girl if she resisted.

- On March 11, 1986 (a few days before Richardson's murder), Rowland assaulted his stepsister with a knife and threatened to kill her. Their dispute involved the locking of a door, but the underlying cause was apparently her antagonistic response to his expressed romantic interest.

- Also on March 11, 1986, Rowland assaulted, threatened to kill, and may have raped a woman. After Rowland, Lanet, and the woman used methamphetamine together, Rowland offered to drive the woman home. Instead, he drove her to the top of a cliff that loomed over a body of water. At the cliff, he pulled her out of the car, beat her, and said he was going to kill her and throw her body off the cliff. He told her to undress and she complied. He continued to beat and choke her, and may have raped her. He then drove her to his mother's house, where he kept her in the bathroom against her will. Rowland called Lanet and admitted what he had done. Rowland asked the woman to hold off calling the police, and then he fled.

As to Rowland's prior felony convictions, the State established that Rowland was convicted of multiple counts of kidnapping, rape, sodomy, and other felonies for the vicious attack on the thirteen-year-old girls.

In mitigation, Rowland himself did not testify, but he presented evidence of his family background, including physical abuse and alcoholism. He was born into a middle class family in 1961, and had one brother and two sisters. His parents had a violent, alcoholic marriage. His mother neglected and abused him, and twice attempted to drown him in the bathtub as a baby. As a toddler, he experienced night terrors and convulsions. At a young age, he commenced psychotherapy and drug therapy. In school, he had learning disabilities and behavioral problems. He started to abuse alcohol and drugs, and proceeded to spend substantial time in correctional facilities.

Rowland was diagnosed with different mental conditions at various points in his life. For example, when he was six or seven years old, he was diagnosed with hyperactivity. At the time of trial, when he was twenty-six, Rowland was diagnosed with borderline personality disorder. As discussed further below, psychiatrist Dr. Hugh Ridlehuber testified for Rowland at the penalty phase.

Rowland also offered the background of his family members as mitigation evidence. His parents each came from violent, sexually abusive, alcoholic backgrounds. Rowland's parents physically and/or sexually abused his sister, and Rowland's father abused his mother.

The jury returned a death sentence.

### B. Post-Conviction Proceedings

On December 17, 1992, the California Supreme Court affirmed Rowland's conviction and death sentence. *See People v. Rowland*, 841 P.2d 897 (Cal. 1992).

On March 7, 1994, Rowland filed his first habeas petition in the California Supreme Court. His state habeas petition was accompanied by supporting declarations, including from Dr. Ridlehuber, who had testified for Rowland in the penalty phase and now declared that he had been hired by trial counsel "too late" to do an adequate examination. The California Supreme Court summarily denied the petition on the merits on June 1, 1994.

On August 26, 1994, Rowland filed a motion in federal district court requesting appointment of counsel and a stay of execution pending preparation of his finalized habeas petition. On June 19, 1995, after counsel was appointed, Rowland filed a motion for a further stay of execution, which was accompanied by a partial list of non-frivolous issues to be raised in the finalized petition. On June 28, 1996, after the effective date of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Rowland filed his finalized habeas petition.

Rowland ultimately filed his operative third amended habeas petition on November 19, 2007. On October 2, 2012, the district court granted summary judgment in favor of the State. The district court rejected Rowland's argument that AEDPA does not apply to his case. The district court also denied a certificate of appealability ("COA") on all of Rowland's claims.

Rowland then filed a timely appeal, and our court granted a COA on a number of issues.

## II. STANDARD OF REVIEW

We review de novo a district court's denial of a habeas petition and for clear error any factual findings made by the

district court. *Hurles v. Ryan*, 752 F.3d 768, 777 (9th Cir. 2014).

Under AEDPA, when a state court has decided a claim on the merits, we may grant relief only if the adjudication "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d).

This standard is "highly deferential" and "difficult to meet." *Harrington v. Richter*, 562 U.S. 86, 102, 105 (2011) (citations omitted). It "demands that state-court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam). AEDPA "reflects the view that habeas corpus is a 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." *Harrington*, 562 U.S. at 102–03 (citation omitted). An unreasonable application of clearly established federal law must be "objectively unreasonable, not merely wrong; even clear error will not suffice." *White v. Woodall*, 134 S. Ct. 1697, 1702 (2014) (internal quotation marks and citation omitted). "Rather, '[a]s a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Id.* (citation omitted).

Here, the California Supreme Court provided reasoned decisions for denying some of Rowland's claims, but

summarily denied others. For those claims where the state court provided an adjudication on the merits, but without any underlying reasoning, we must conduct an independent review of the record to determine whether the state court's final resolution of the case constituted an unreasonable application of clearly established federal law. *See Greene v. Lambert*, 288 F.3d 1081, 1088–89 (9th Cir. 2002). "Independent review of the record is not de novo review of the constitutional issue, but rather, the only method by which we can determine whether a silent state court decision is objectively unreasonable." *Himes v. Thompson*, 336 F.3d 848, 853 (9th Cir. 2003).

## III. DISCUSSION

### A. AEDPA Applies to Rowland's Federal Habeas Petition

We first address AEDPA's application here. Rowland contends that AEDPA is inapplicable because on August 26, 1994, before AEDPA's effective date, he filed a request for appointment of counsel and a stay of execution. At the time, a Northern District of California local rule stated that such a motion "shall be deemed to be a petition for writ of habeas corpus with leave having been granted to amend the petition upon appointment of counsel." N.D. Cal. R. 296-8(b) (1990). On the district court docket, "COURT STAFF" labeled the entry as "PETITION FOR WRIT OF HABEAS CORPUS."

Also before AEDPA's effective date, on June 19, 1995, Rowland's newly appointed counsel filed an application for a stay of execution to permit preparation of a habeas petition, which included a partial list of non-frivolous issues to be raised in the petition. Again, at the time, the local rule stated that "[i]f no filing was made under paragraph 8(b) above, the

specification of nonfrivolous issues required [for a new counsel's application for a temporary stay of execution] shall be deemed to be a petition for writ of habeas corpus with leave having been granted to amend the petition." N.D. Cal. R. 296-8(c) (1990).

AEDPA took effect on April 24, 1996. *See Lindh v. Murphy*, 521 U.S. 320, 322, 327 (1997) (holding that AEDPA does not apply to cases "pending" in federal court on AEDPA's effective date). On June 28, 1996, Rowland filed his actual habeas petition seeking adjudication on the merits of his claims. Nonetheless, Rowland argues AEDPA does not govern his petition because of his pre-AEDPA request for appointment of counsel and a stay of execution.

The Supreme Court has rejected a similar argument. *Woodford v. Garceau* holds that AEDPA applies to a habeas petition filed after AEDPA's effective date, even if the petitioner sought the appointment of counsel and/or a stay of execution before AEDPA's effective date. 538 U.S. 202, 205–06 (2003). The Supreme Court reasoned that:

> [W]hether AEDPA applies to a state prisoner turns on what was before a federal court on the date AEDPA became effective. If, on that date, the state prisoner had before a federal court an application for habeas relief seeking an adjudication on the *merits* of the petitioner's claims, then amended § 2254(d) does not apply. Otherwise, an application filed after AEDPA's effective date should be reviewed under AEDPA, even if other filings by that same applicant such as, for example, a request for the appointment of counsel or a motion for a stay of execution—

> were presented to a federal court prior to AEDPA's effective date.

*Id.* at 207 (emphasis in original). The Court also noted that a filing labeled "Specification of Non-Frivolous Issues" was insufficient to "place the merits of respondent's claims before the District Court for decision" because "the document simply alerted the District Court as to some of the possible claims that might be raised by respondent in the future." *Id.* at 210 n.1. Thus, the Court concluded that for AEDPA purposes "a case does not become 'pending' until an actual application for habeas corpus relief is filed in federal court." *Id.* at 210.

Rowland argues that *Garceau* is distinguishable because his pre-AEDPA request for appointment of counsel and stay of execution was "deemed to be a petition for writ of habeas corpus" under the local rule and designated on the docket as a "PETITION FOR WRIT OF HABEAS CORPUS." But under *Garceau*, even if his pre-AEDPA filings are considered a "petition for writ of habeas corpus," they are insufficient to preclude AEDPA's application because they did not place the "merits" of Rowland's claims before the district court for adjudication. 538 U.S. at 207, 210 n.1. Thus, *Garceau* controls here.[1]

[1] We are also unpersuaded by Rowland's argument that AEDPA does not apply because he relied in good faith on the district court's local rule and docket entry which deemed his pre-AEDPA motion a petition for writ of habeas corpus. An exception to good faith reliance exists where a court lacks the power or discretion to take the action in question, and Rowland provides no authority that would grant a court the power to change AEDPA's statutorily mandated standard of review. *See Perry v. Brown*, 667 F.3d 1078, 1087 n.6 (9th Cir. 2012). Further, it would have

Accordingly, we conclude that AEDPA, and its highly deferential standard of review, applies to Rowland's case.

### B. Ineffective Assistance of Counsel at Penalty Phase

Rowland argues that his attorneys were ineffective at the penalty phase by failing to: (1) adequately prepare psychiatrist Dr. Ridlehuber; and (2) call Lanet as a witness. To prevail, Rowland must show both that his counsel was deficient and that he was prejudiced as a result. *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984). Deficient performance requires showing that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. Prejudice requires showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

The standards created by *Strickland* and AEDPA "are both 'highly deferential,' and when the two apply in tandem, review is 'doubly' so." *Harrington*, 562 U.S. at 105 (internal citations omitted). Thus, under AEDPA, "[t]he pivotal question is whether the state court's application of the *Strickland* standard was unreasonable." *Id.* at 101.

#### 1. Inadequate Preparation of Psychiatrist Dr. Ridlehuber

Rowland contends that his trial attorneys contacted Dr. Ridlehuber, a psychiatrist who testified at the penalty phase, "too late" to perform an adequate evaluation and failed to provide him with important medical records about Rowland's "traumatic birth," and that as a result mitigating

been unreasonable for Rowland to rely on the local rule, which preceded AEDPA by six years, to avoid AEDPA's application.

psychiatric evidence was not discovered or presented. Rowland raised this claim in his first state habeas petition, which the California Supreme Court summarily denied. Therefore, we must independently review the record to determine the reasonableness of the California Supreme Court's decision. *See Greene*, 288 F.3d at 1088–89.

### a. Background

Some background helps put this claim in context. Rowland's counsel began consulting mental health professionals almost two years before Rowland's trial. In May 1986, defense counsel retained a psychiatrist who examined Rowland, but concluded that there was no viable mental defense in the guilt phase. In August 1986, defense counsel also retained a psychologist, who conducted psychological testing of Rowland. In addition, defense counsel sent an investigator to interview a mental health professional who had treated Rowland at the California Medical Facility.

Defense counsel initially retained psychiatrist Dr. Ridlehuber in February 1988 (approximately one month before the guilt phase trial), to evaluate Rowland for Attention Deficit Disorder ("ADD") at the suggestion of the other mental health experts. Dr. Ridlehuber examined Rowland for four hours, and could not substantiate that he had ADD.

Rowland's trial began in March 1988. None of the doctors testified for Rowland in the guilt phase.

Rowland was convicted on May 13, 1988, and then the penalty phase began less than two weeks later on May 23. On May 18, a few days before the penalty phase began, defense counsel contacted Dr. Ridlehuber, informed him

that Rowland had been found guilty, and asked if he would be able to testify as to the effect of Rowland's childhood circumstances on his adult personality. Defense counsel spoke with Dr. Ridlehuber again on May 22, and then the two consulted with another psychiatrist for two hours on May 23. According to Dr. Ridlehuber's declarations, between May 21 and May 30, "while the penalty phase trial was already in progress," he performed a "more expansive, however still inadequate, evaluation of Mr. Rowland consisting of 14 hours of interview and nine hours of research, review and analysis." In addition to interviewing Rowland, Dr. Ridlehuber reviewed multiple sources of information, including Rowland's family history, information from a doctor who treated Rowland as a child, reports from a defense investigator who had interviewed a number of Rowland's family members, and Rowland's treatment in the California Medical Facility.

On May 31, 1988, Dr. Ridlehuber testified for Rowland at the penalty phase. Dr. Ridlehuber opined that Rowland suffered from a borderline personality disorder, "a major psychiatric disorder [that] can be just as disruptive as schizophrenia." But, he also testified that he found no evidence of organic brain dysfunction or schizophrenia. In addition, Dr. Ridlehuber testified that Rowland was very vulnerable to rejection and his ability to handle interpersonal relationships was severely impaired because of his abusive and traumatic childhood. In his closing, the prosecutor argued that the jury should "totally reject" Dr. Ridlehuber's opinion because his report had been "rushed together in a week."

Two Dr. Ridlehuber declarations supported Rowland's first state habeas petition. Dr. Ridlehuber stated that defense counsel contacted him "too late" in the proceedings to

evaluate Rowland adequately. He stated that the "time constraints under which [he] was working made it virtually impossible to conduct anything other than the most general type of testing." He also stated that he did not have Rowland's complete medical records, particularly a medical history form completed by Rowland's mother when Rowland was ten years old, which noted that within the first four weeks of life he had "jaundice, blood transfusion, convulsions, and an infection."

Based on information he did not have at the time of trial, such as the circumstances of Rowland's "traumatic birth," Dr. Ridlehuber now thought there was a "very high probability" that Rowland did have an organic brain condition, "possib[ly]" Bipolar Affective Disorder, "probably" fetal distress syndrome, and "quite possibly" Attention Deficit Hyperactivity Disorder, Adult Residual Form. Dr. Ridlehuber stated that if he had this additional information, he would have performed further tests to determine whether Rowland had organic brain damage. For example, Dr. Ridlehuber now thought that Rowland "may" have had damage in the "frontal lobe area of the brain," which he did not test at the time of trial.

**b. Analysis**

"To perform effectively in the penalty phase of a capital case, counsel must conduct sufficient investigation and engage in sufficient preparation to be able to 'present[ ] and explain[ ] the significance of all the available [mitigating] evidence.'" *Mayfield v. Woodford*, 270 F.3d 915, 927 (9th Cir. 2001) (en banc) (quoting *Williams v. Taylor*, 529 U.S. 362, 393, 399 (2000)). And, failure to timely prepare for the penalty phase can constitute deficient performance. *See Williams*, 529 U.S. at 395 (holding that counsel was deficient at the penalty phase because he did not begin preparing until

"a week before the trial" and failed to uncover records of the petitioner's "nightmarish childhood"); *Jells v. Mitchell*, 538 F.3d 478, 493–94 (6th Cir. 2008) (holding that "[t]he failure of [the petitioner's] trial counsel to begin mitigation preparations prior to the end of the culpability phase of [the] trial was objectively unreasonable under *Strickland*").

Rowland's trial attorneys were deficient by retaining Dr. Ridlehuber for the penalty phase only a few days before its start and by failing to prepare him adequately, and it would be unreasonable for the California Supreme Court to conclude otherwise. *See Bean v. Calderon*, 163 F.3d 1073, 1078 (9th Cir. 1998) (holding that counsel was deficient by delaying preparing penalty phase mitigating evidence, including not contacting a mental health expert "to prepare him for the penalty phase until a day or two before his testimony"); *Bloom v. Calderon*, 132 F.3d 1267, 1277–78 (9th Cir. 1997) (holding that counsel was deficient by failing to obtain a psychiatric expert until days before trial, and then failing to adequately prepare the expert); *see also Bond v. Beard*, 539 F.3d 256, 288 (3d Cir. 2008) (holding that counsel was deficient in part because they "waited until the eve of the penalty phase to begin their preparation" which caused them to "fail[] to give their consulting expert sufficient information to evaluate [the petitioner] accurately," and noting that under the professional norms established by the American Bar Association, a mitigation investigation should begin immediately and expeditiously).

Rowland's counsel's retention of mental health experts for the guilt phase, including a brief evaluation of Rowland by Dr. Ridlehuber for ADD, does not excuse their delay in retaining an expert for the penalty phase. *See Doe v. Ayers*, 782 F.3d 425, 441 (9th Cir. 2015) ("Hiring an expert to evaluate possible guilt-phase mental-state defenses does not

discharge defense counsel's duty to prepare for the penalty phase."); *Hendricks v. Calderon*, 70 F.3d 1032, 1043–44 (9th Cir. 1995) ("[I]t does not follow that an investigation sufficient to foreclose the possibility of a mental defense necessarily forecloses the possibility of presenting evidence of mental impairment as mitigation in the penalty phase.").

Further, Rowland's counsel's tardy retention of Dr. Ridlehuber opened up the prosecutor's attack that Dr. Ridlehuber's report had been "rushed together in a week" and therefore the jury should "totally reject" his opinion. *See Hovey v. Ayers*, 458 F.3d 892, 928 (9th Cir. 2006) (holding that counsel was deficient at the penalty phase in part by failing to adequately prepare a psychiatric expert which "would have prevented the prosecutor from portraying [the expert] as ill-prepared and foolish and thereby impugning his medical conclusions").

But to prevail, Rowland must show that Dr. Ridlehuber's testimony and report, prepared with sufficient time and resources, would satisfy the onerous AEDPA standard for a claim of ineffective assistance of counsel. He cannot. Under AEDPA's highly deferential standard of review, the California Supreme Court could have reasonably concluded that Rowland was not prejudiced by his counsel's deficient preparation of Dr. Ridlehuber for the penalty phase. Dr. Ridlehuber merely speculates that Rowland possibly has organic brain damage and other mental health conditions. The California Supreme Court could have reasonably determined that the limited value of additional testimony from Dr. Ridlehuber about Rowland's mental diagnoses would not have changed the outcome of the penalty phase when weighed against the aggravating evidence of Rowland's brutal rape and murder of Richardson, and Rowland's egregious criminal record of multiple sexual

assaults and violent attacks, including repeatedly raping a kidnapped 13-year-old girl. *See Wiggins v. Smith*, 539 U.S. 510, 534 (2003) ("In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence."); *see also Wong v. Belmontes*, 558 U.S. 15, 26 (2009) (per curiam) (holding in a capital case that there was no prejudice due to counsel's failure to introduce more mitigating evidence because the aggravating evidence was "simply overwhelming" (citation omitted)).

Thus, giving the California Supreme Court the "benefit of the doubt" as we must under AEDPA, it reasonably rejected Rowland's ineffective assistance of counsel claim regarding the preparation of Dr. Ridlehuber for the penalty phase. *Visciotti*, 537 U.S. at 24. Accordingly, we affirm the district court's denial of relief on this claim.

### 2. Not Calling Lanet as a Witness at the Penalty Phase

Rowland argues that he was denied effective assistance of counsel because his attorneys failed to call Lanet (the woman he confessed to) to testify at the penalty phase about Rowland's statements describing his argument with Richardson before he killed her. He contends that such evidence would have shown that he killed Richardson after an argument about drugs and her negative opinion of felons, rather than as part of a rape.

The California Supreme Court denied this claim in a reasoned decision on direct appeal:

> Counsel's performance was not deficient because the [failure to call Lanet at the penalty phase] was not unreasonable. In view of the evidence concerning the

> circumstances of the present offenses adduced at the guilt phase, counsel could properly have declined to reopen the matter—especially through a self-serving, out-of-court statement by defendant. Moreover, even if counsel's performance had been deficient, it could not have subjected defendant to prejudice. There is no reasonable probability that the introduction of a statement of the sort here would have affected the outcome.

*Rowland*, 841 P.2d at 920 (footnote omitted).

Rowland contends that Lanet's testimony was critical mitigating evidence because it would have explained his motive for killing Richardson, cast doubt on whether the murder occurred in the course of a rape, and showed that he was not a wanton murderer deserving death. He notes that the trial judge acknowledged, in making an evidentiary ruling during the guilt phase, that Rowland's statements would "certainly, arguably . . . tend to support perhaps a second degree murder, perhaps even a manslaughter finding" because they "could be urged as a sudden quarrel, support of that sort of theory."

Rowland further contends that his trial counsel had no strategic reason for failing to call Lanet as a witness at the penalty phase. He concedes that it was reasonable at the guilt phase for trial counsel, when cross-examining Lanet, not to elicit testimony regarding Rowland's statements about the argument because it would have allowed the State to introduce rebuttal evidence of Rowland's prior criminal record. But, the argument goes, this strategic reason would not apply to the penalty phase because the State already had

introduced Rowland's prior criminal record as aggravating evidence.

However, the California Supreme Court reasonably decided that Rowland's counsel's performance was not deficient because his counsel could have made a strategic decision to omit Lanet's testimony at the penalty phase. *See Strickland*, 466 U.S. at 689 (to show deficiency, a petitioner must overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" and "might be considered sound trial strategy" under the circumstances (citation omitted)). For example, his counsel may have reasonably concluded that it would be harmful at the penalty phase to recall Lanet and revisit the circumstances of Rowland's brutal crime. In addition, even if his counsel's performance were deficient, the California Supreme Court reasonably decided that Rowland had not shown prejudice because there is no reasonable probability that the limited value of Lanet's testimony would have changed the outcome of the penalty phase, especially in light of his monstrous criminal history. *See id.* at 694.

Accordingly, we affirm the district court's denial of relief on this claim.

### C. Prosecutor's Statements at Penalty Phase Closing Argument

Rowland challenges two of the prosecutor's statements made in the penalty phase. While both statements were inappropriate, we conclude that, applying AEDPA's extreme deference, the California Supreme Court reasonably determined that neither statement violated Rowland's constitutional rights.

### 1. Personal Opinion About the Death Penalty

Rowland argues that the prosecutor violated due process during his closing argument when he expressed his personal belief that he would vote for the death penalty if he were on the jury. Specifically, the prosecutor stated in his summation asking the jury to impose the death penalty that "[I] never [] ask others to do what I would not feel is right, and what I would not do myself" and "I would not ask you to do something that I would not do." Defense counsel asked "the court to admonish the jury that they should not consider [the prosecutor's] personal feelings in arriving at the appropriate penalty," which the trial court refused to do.

The California Supreme Court denied this claim in a reasoned decision on direct appeal:

> We agree [with the trial court]. True, a prosecutor may not "state his personal belief regarding . . . the appropriateness of the death penalty, *based on facts not in evidence*." (*People v. Ghent* (1987) 43 Cal. 3d 739, 772, 239 Cal. Rptr. 82, 739 P.2d 1250, italics in original). But he may make a statement of this sort if, as here, it is "based solely on the facts of record." (*Ibid.*) There is no reasonable likelihood that the jury understood the words otherwise. Of course, "prosecutors should refrain from expressing personal views which might unduly inflame the jury against the defendant." (*Ibid.*) The views expressed by the prosecutor in this case were not such.

*Rowland*, 841 P.2d at 924.

Like the district court, we disapprove of the prosecutor's comments, but conclude that the California Supreme Court's decision was not contrary to, or an unreasonable application of, clearly established United States Supreme Court law, nor was it an unreasonable determination of the facts.

A prosecutor's improper comments violate the Constitution only if they "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (citation omitted). "[I]t is not enough that the prosecutors' remarks were undesirable or even universally condemned." *Id.* (internal quotation marks and citation omitted).

Rowland contends that under Supreme Court precedent, a prosecutor may not express his personal beliefs, irrespective of its basis on evidence in the record, because "the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." *United States v. Young*, 470 U.S. 1, 18 19 (1985). However, in *Young* itself, the Court concluded that "[a]lthough it was improper for the prosecutor to express his personal opinion about respondent's guilt," the remarks did not "undermine the fairness of the trial and contribute to a miscarriage of justice" and thus did not require reversal.[2] *Id.*

[2] Rowland also cites *Berger v. United States*, 295 U.S. 78, 88 (1935), which noted that "improper suggestions, insinuations, and, especially, assertions of personal knowledge [by the prosecutor] are apt to carry much weight against the accused when they should properly carry none." But, *Berger* is different. There, the prosecutor made improper statements that referred to his personal knowledge based on evidence outside the record, which required reversal because the case against the defendant was weak and the prosecutor's misconduct was not "slight or confined to a single instance, but . . . pronounced and persistent, with a probable

at 19–20. Likewise here, the prosecutor's improper remarks expressing his personal opinion about the appropriateness of the death penalty for Rowland did not undermine the fundamental fairness of the trial.

Rowland also relies on *Weaver v. Bowersox*, 438 F.3d 832, 840 41 (8th Cir. 2006), in which the Eighth Circuit held that a petitioner was entitled to habeas relief based in part on the prosecutor's improper statements during closing argument in the penalty phase "about his personal belief in the death penalty." *Weaver* reasoned that "[s]tatements about the prosecutor's personal belief in the death penalty are inappropriate and contrary to a reasoned opinion by the jury," and noted that "[a] prosecutor should not emphasize his or her position of authority in making death penalty determinations because it may encourage the jury to defer to the prosecutor's judgment." *Id.*; *see also Bates v. Bell*, 402 F.3d 635, 644 (6th Cir. 2005) ("In the capital sentencing context, prosecutors are prohibited from expressing their personal opinion as to the existence of aggravating or mitigating circumstances and the appropriateness of the death penalty. Jurors are mindful that the prosecutor represents the State and are apt to afford undue respect to the prosecutor's personal assessment.").

Here, however, the prosecutor's statements that "[I] never [] ask others to do what I would not feel is right, and what I would not do myself" and "I would not ask you to do something that I would not do" do not rise to the level of the statements in *Weaver*. For example, in *Weaver*, unlike here, the prosecutor made a litany of improper statements, including that that he "had a special position of authority and

cumulative effect upon the jury which cannot be disregarded as inconsequential." *Id.* at 88–89.

decided whether to seek the death penalty." 438 F.3d at 840; *cf. Barnett v. Roper*, 541 F.3d 804, 813 (8th Cir. 2008) (denying habeas relief based on prosecutor's statement during her penalty phase opening argument that "if those [murders] don't [warrant imposition of the death penalty], I don't know what does" because her comment "does not compare in polemical stridency with those [in other cases, including *Weaver*,] and was not so outrageous or prejudicial as to warrant a sua sponte declaration by the trial court of a mistrial, nor did it inject such unfairness into the penalty phase that [the petitioner] was denied due process of law").

Moreover, the Supreme Court has emphasized that "the *Darden* standard is a very general one, leaving courts 'more leeway . . . in reaching outcomes in case-by-case determinations[.]'" *Parker v. Matthews*, 567 U.S. 37, 48 (2012) (per curiam) (citation omitted). In *Parker*, the Court reversed the Sixth Circuit's grant of habeas relief based on the prosecutor's alleged violation of *Darden* by suggesting in closing argument that the petitioner had colluded with his counsel and an expert to manufacture an extreme emotional disturbance defense. *Id.* at 45–48. The Court held that the Sixth Circuit overlooked the context of the prosecutor's comment, and that "even if the comment is understood as directing the jury's attention to inappropriate considerations, that would not establish that the Kentucky Supreme Court's rejection of the *Darden* prosecutorial misconduct claim 'was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Id.* at 47 (citation omitted). The Court noted that "*Darden* itself held that a closing argument considerably more inflammatory than the one at issue here did not warrant habeas relief." *Id.* at 47 48 (citing *Darden*, 477 U.S. at 180 n.11 (prosecutor referred to the defendant as an "animal"); *id.* at 180 n.12 ("I wish I could

see [the defendant] with no face, blown away by a shotgun")). Thus, the Court concluded that "the Sixth Circuit had no warrant to set aside the Kentucky Supreme Court's conclusion." *Id.* at 48.

Here, the California Supreme Court's rejection of Rowland's *Darden* claim based on the prosecutor's statements expressing his personal opinion about the appropriateness of the death penalty was not "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 47 (citation omitted).

Furthermore, any prosecutorial misconduct amounting to a constitutional violation was harmless because it did not have a "substantial and injurious effect" on the jury's verdict for death. *Parle v. Runnels*, 387 F.3d 1030, 1044 (9th Cir. 2004) ("Even if a state court decision is 'contrary to' or 'involved an unreasonable application of' clearly established federal law, a habeas court may grant relief only if petitioner shows that the error had a 'substantial or injurious effect' on the verdict." (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637–38 (1993)). Rowland's egregious criminal history spoke louder than anything the prosecutor said.

Accordingly, we affirm the district court's denial of relief on this claim.

### 2. California Voters' Approval of the Death Penalty

Rowland also contends that the prosecutor committed *Caldwell* error and violated due process by referencing California voters' "overwhelming" support for the death penalty and the ouster of three California Supreme Court justices because they failed to enforce the death penalty.

The California Supreme Court denied this claim in a reasoned decision on direct appeal:

> [D]efendant complains of certain unobjected-to comments in the prosecutor's summation that allegedly misled the jury on its role in determining penalty.
>
> In context, the message the prosecutor delivered was this: the jurors' function was judicial, not legislative; they had to decide whether the death penalty was the appropriate punishment in this case, not whether it should be available as a sanction in general. That message, of course, was altogether sound.
>
> We do not overlook—and certainly do not approve such remarks as this: "We had a recent election in which several of our Supreme Court justices were perceived by the voters not to be applying [the death penalty] law. They are gone now. There's no question that it is the policy expressed by the will of the populace that there be a death penalty in California, and that it be carried out in appropriate cases." Or this: "[T]he voters overwhelmingly approved the death penalty. . . ."
>
> Nevertheless, there is no reasonable likelihood that the jury understood the challenged remarks as defendant asserts—and surely not in such a way as to "minimize [its] sense of responsibility for determining

> the appropriateness of death" in violation of the Eighth Amendment to the United States Constitution as construed in *Caldwell v. Mississippi* (1985) 472 U.S. 320, 341.

*Rowland*, 841 P.2d at 921–22 (parallel citations omitted).

Again, while we disapprove of the prosecutor's comments, we conclude that the California Supreme Court's decision was not contrary to, or an unreasonable application of, clearly established United States Supreme Court law, nor was it an unreasonable determination of the facts.

In *Caldwell*, the Supreme Court held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." 472 U.S. at 328–29. The Court vacated the death sentence because the prosecutor had improperly "sought to minimize the jury's sense of responsibility for determining the appropriateness of death" by leading the jury "to believe that responsibility for determining the appropriateness of a death sentence rests not with the jury but with the appellate court which later reviews the case." *Id.* at 323, 341.

Rowland argues that the prosecutor's comments violated *Caldwell* because they led the jury to believe that responsibility for determining the appropriateness of his death sentence rested not with the jury but with the voters of California who had overwhelmingly approved the death penalty. However, under AEDPA's highly deferential standard of review, the California Supreme Court reasonably determined that there was no *Caldwell* error because, in context, the prosecutor's remarks did not "minimize the jury's responsibility for determining the appropriateness of

death," but rather conveyed that the jury's responsibility was not to determine whether the death penalty should be available as a sanction in general. 472 U.S. at 341; *cf. Campbell v. Kincheloe*, 829 F.2d 1453, 1460–61 (9th Cir. 1987) (holding that the prosecutor's remark that it was not the jury's duty to "debate the death penalty" was merely a "general comment on the validity of the death penalty per se" and did not constitute *Caldwell* error). Nor did the prosecutor's comments, even if they were "undesirable" or "universally condemned," "so infect[] the trial with unfairness as to make the resulting [death sentence] a denial of due process." *Darden*, 477 U.S. at 181 (citations omitted). And, again, any prosecutorial misconduct amounting to a constitutional violation was harmless because it did not have a "substantial and injurious effect" on the jury's verdict for death. *Parle*, 387 F.3d at 1044.

Accordingly, we affirm the district court's denial of relief on this claim.[3]

[3] Rowland also argues that his counsel was ineffective by failing to object to the prosecutor's remarks about California voters. The California Supreme Court denied this claim on the merits in a reasoned decision. *Rowland*, 841 P.2d at 924 n.19. This decision was not contrary to, or an unreasonable application of, clearly established United States Supreme Court law, nor was it an unreasonable determination of the facts. Under the double deference afforded by AEDPA and *Strickland*, Rowland's counsel was not deficient, and Rowland was also not prejudiced by his counsel's failure to object.

Rowland's reliance on *Zapata v. Vasquez*, 788 F.3d 1106 (9th Cir. 2015), is misplaced. *Zapata* granted habeas relief based on the trial counsel's failure to object to the prosecutor's incorrect, inflammatory, and irrelevant remarks in closing argument. *See id.* at 1112–17. This court noted that, in considering whether trial counsel was deficient by failing to object, "our task is made easy because the California Court of

### D. Right to Conflict-Free Counsel

Rowland contends that one of his trial attorneys had an undisclosed conflict of interest. Rowland raised this claim in his first state habeas petition, and the California Supreme Court summarily denied it. Therefore, we must independently review the record to determine whether the California Supreme Court's decision was reasonable. *See Greene*, 288 F.3d at 1088–89.

Specifically, Rowland alleges that his counsel, Charles Pierpoint, had a close personal and professional relationship with Detective Singleton, a chief investigating officer and testifying witness in the case against Rowland. Pierpoint knew Detective Singleton from his time as a Deputy District Attorney in the San Mateo District Attorney's Office. According to Rowland, they remained friends during the time of Rowland's trial. Further, Pierpoint or his legal partner had represented Detective Singleton in several civil suits, including a divorce action. Pierpoint's representation of Detective Singleton terminated before Rowland's trial.

Under the Sixth Amendment, "[w]here a constitutional right to counsel exists, . . . there is a correlative right to representation that is free from conflicts of interest." *Wood*

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Appeal itself concluded 'the prosecutor committed serious misconduct.'" *Id.* at 1112. However, *Zapata* is distinguishable because here the California Supreme Court did not find that the prosecutor committed "serious misconduct" by making incorrect, inflammatory, and irrelevant remarks. Rather, although it disapproved of the remarks, the California Supreme Court found that the prosecutor's message was "sound" and did not mislead the jury. *Rowland*, 841 P.2d at 921.

Accordingly, we affirm the district court's denial of relief on this claim.

*v. Georgia*, 450 U.S. 261, 271 (1981). To establish a Sixth Amendment violation based on a conflict of interest, "a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980). An "actual conflict" means "a conflict of interest that adversely affects counsel's performance," rather than "a mere theoretical division of loyalties." *Mickens v. Taylor*, 535 U.S. 162, 171, 172 n.5 (2002). When this standard is met, prejudice is presumed because the "assistance of counsel has been denied entirely or during a critical stage of the proceeding." *Id.* at 166. In other words, it is an exception to the usual requirement to show *Strickland* prejudice for a Sixth Amendment violation. *Id.*

Rowland argues that there was an "actual conflict," and thus a presumption of prejudice, based on his attorney Pierpoint's relationship with Detective Singleton. However, in *Mickens*, the Supreme Court explicitly limited this presumption of prejudice for an actual conflict of interest (also known as the "*Sullivan* exception") to cases involving "concurrent representation." *Id.* at 175; *see also Earp v. Ornoski*, 431 F.3d 1158, 1184 (9th Cir. 2005) ("The *Mickens* Court specifically and explicitly concluded that *Sullivan* was limited to joint representation[.]"). The Court explained that the presumption of prejudice was needed in these situations because of "the high probability of prejudice arising from multiple concurrent representation, and the difficulty of proving that prejudice," and noted that "[n]ot all attorney conflicts present comparable difficulties." *Mickens*, 535 U.S. at 175. The Court chastised the circuit courts for applying "*Sullivan* 'unblinkingly' to 'all kinds of alleged attorney ethical conflicts,'" invoking it in cases involving former clients and personal or financial interests. *Id.* at 174 (citation omitted). The Court explicitly stated that

"[w]hether *Sullivan* should be extended to [successive representation] cases remains, as far as the jurisprudence of this Court is concerned, an open question." *Id.* at 176. Accordingly, the Court concluded that the *Sullivan* presumption of prejudice did not apply to a conflict of interest rooted in the petitioner's counsel's previous brief representation of the victim. *See id.* at 164–65, 175–76.

We have held that a state court's rejection of a conflict claim not stemming from concurrent representation is neither contrary to, nor an unreasonable application of, established federal law as determined by the United States Supreme Court. *See, e.g.*, *Foote v. Del Papa*, 492 F.3d 1026, 1029 (9th Cir. 2007) (holding that the state court did not unreasonably reject a conflict claim because the Supreme Court has not "held that a defendant states a Sixth Amendment claim by alleging that appointed appellate counsel had a conflict of interest due to the defendant's dismissed lawsuit against the public defenders office and appointed pre-trial counsel"); *Earp*, 431 F.3d at 1184 (holding that the state court did not unreasonably reject a conflict claim arising from the petitioner's counsel developing a romantic relationship with the petitioner culminating in their marriage because "[t]he Supreme Court has never held that the *Sullivan* exception applies to conflicts stemming from intimate relations with clients"). Likewise here, the California Supreme Court's rejection of Rowland's non-concurrent representation conflict claim was neither contrary to, nor an unreasonable application of, established federal law.

We acknowledge that we have previously stated that "[i]t is clearly established by Supreme Court precedent that 'successive representation' may pose an actual conflict of interest because it may have an adverse [e]ffect on counsel's

performance." *Alberni v. McDaniel*, 458 F.3d 860, 872, 874 (9th Cir. 2006) (citing *Mickens*, 535 U.S. at 175–76) (remanding for an evidentiary hearing on a conflict claim arising from the petitioner's representation by counsel who cross-examined a prosecution witness who was a former criminal client in a related case and noting that "[s]hould the district court conclude that an actual conflict of interest existed, [the petitioner] need not show prejudice"); *but see id.* at 874–76 (McKeown, J., concurring in part and dissenting in part) (disagreeing with majority relieving the petitioner of showing prejudice for a successive representation claim, "an approach—as explained in *Mickens* []—that has not been established by Supreme Court precedent").[4] However, unlike here, *Alberni* did not involve prior representation in unrelated civil matters.

Moreover, even if successive representation could constitute an actual conflict under established federal law, Rowland has not demonstrated that any conflict due to his counsel Pierpoint's relationship with Detective Singleton "significantly affected counsel's performance." *Mickens*, 535 U.S. at 172–73. Rowland argues that "Pierpoint's closing argument—specifically his gratuitous vouching to the jury of Singleton's honesty and integrity—is powerful

[4] *See also Houston v. Schomig*, 533 F.3d 1076, 1081 83 (9th Cir. 2008) (remanding for an evidentiary hearing on a conflict claim arising from the petitioner's representation by another member of the same public defender's office that previously had represented a victim and key prosecution witness, and stating that "[c]onflicts can . . . arise from successive representation, particularly when a substantial relationship exists between the cases, such that the 'factual contexts of the two representations are similar or related'" but noting that "[t]he Supreme Court . . . has left open the question whether conflicts in successive representation that affect an attorney's performance require a showing of prejudice for reversal" (citation omitted)).

evidence that trial counsel had an actual conflict that adversely affected his performance." In particular, Rowland criticizes Pierpoint's statement that Detective Singleton and his partner Detective Dirickson "are highly credible, honest, hard working, diligent police officers. And I urge you to believe everything they said."

However, when read in context, this statement does not show that Pierpoint was adversely affected by his relationship with Detective Singleton. Pierpoint's praise was directed more at Detective Dirickson, and only mentioned Detective Singleton in passing. And, Pierpoint's praise of Detective Dirickson was part of his attempt to cast doubt on Lanet's credibility, and thus on Rowland's confession and the physical evidence she provided. Therefore, the California Supreme Court could conclude that Pierpoint's praise of Detective Dirickson (and by association Detective Singleton) was a reasonable tactical choice to attack the State's case.[5]

Accordingly, under AEDPA's highly deferential standard, the California Supreme Court reasonably rejected

[5] This case is not affected by our recent decision in *United States v. Walter-Eze*, 869 F.3d 891 (9th Cir. 2017). That case "[a]ssum[ed] without deciding that *Sullivan*'s rule of presumed prejudice as a matter of law can extend to a case of a pecuniary conflict" and held that even though there was an actual conflict, "under the facts presented, *Sullivan* does not control this case" and there was not a presumption of prejudice because, unlike with joint representation, "the actual conflict [was] relegated to a single moment of the representation and resulted in a single identifiable decision that adversely affected the defendant[.]" *Id.* at 900, 906. In contrast, this case does not involve an alleged pecuniary conflict or an "actual conflict."

Rowland's conflict of interest claim, and we affirm the district court's denial of habeas relief.[6]

### E. Uncertified Issue

Finally, we deny a COA on the one uncertified issue Rowland raises on appeal. Rowland argues that systemic delay in the administration of California's death penalty renders any ensuing executions arbitrary, and thus in violation of the Eighth Amendment, which is known as a "*Jones* claim." *See Jones v. Chappell*, 31 F. Supp. 3d 1050 (C.D. Cal. 2014), *rev'd sub nom. Jones v. Davis*, 806 F.3d 538 (9th Cir. 2015).

This claim is unexhausted. Rowland argues that his failure to exhaust should be excused because raising the claim in state court would be futile. However, as Rowland acknowledges, we rejected the same argument in *Alfaro v. Johnson*, 862 F.3d 1176, 1180–83 (9th Cir. 2017).[7]

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[6] In his reply brief, Rowland argues for the first time that "[e]ven if none of the foregoing errors by itself warrants relief, the cumulative errors do." Rowland has waived this argument by not raising it in his opening brief. *See Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999). Moreover, there is no cumulative error which warrants reversal.

[7] There may be some tension in our case law regarding whether exhaustion of a *Lackey* claim—which asserts that delay in a defendant's individual case between judgment and execution constitutes an Eighth Amendment violation, *see Lackey v. Texas*, 514 U.S. 1045 (1997) (Stevens, J., mem. op. respecting denial of cert.)—also serves to exhaust a *Jones* claim. *Compare Alfaro*, 862 F.3d at 1184 ("The key distinguishing factor between *Lackey* and *Jones* claims is that the latter concern *systemic* delay that creates arbitrariness in executions.") *and Jones*, 806 F.3d at 554 (Watford, J., concurring) ("Presenting the *Lackey* claim to the California Supreme Court . . . did not satisfy the exhaustion requirement.") *with Andrews v. Davis*, 866 F.3d 994, 1039 (9th Cir.

Accordingly, we decline to expand Rowland's COA.

**AFFIRMED.**

2017) (holding that the petitioner's reference to *Jones* on appeal did not fundamentally alter his *Lackey* claim, and therefore exhaustion of his *Lackey* claim "likewise exhausted his current challenge"). However, any tension is not implicated here as Rowland did not raise a *Lackey* claim in either state or federal court.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

APR 4 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

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| GUY KEVIN ROWLAND,<br><br>Petitioner-Appellant,<br><br>v.<br><br>KEVIN CHAPPELL, Warden,<br><br>Respondent-Appellee. | No. 12-99004<br><br>D.C. No. 3:94-cv-03037-WHA<br>Northern District of California,<br>San Francisco<br><br>ORDER |

Before: WARDLAW, CLIFTON, and OWENS, Circuit Judges.

The panel has voted to deny the petition for panel rehearing. Judges Wardlaw and Owens voted to deny the petition for rehearing en banc, and Judge Clifton so recommends.

The full court has been advised of the suggestion for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for panel rehearing and the petition for rehearing en banc are therefore DENIED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| GUY KEVIN ROWLAND,<br><br>Petitioner - Appellant,<br><br>v.<br><br>KEVIN CHAPPELL, Warden,<br><br>Respondent - Appellee. | No. 12-99004<br><br>D.C. No. 3:94-cv-03037-WHA<br>Northern District of California,<br>San Francisco<br><br>ORDER |

Before: CANBY and BYBEE, Circuit Judges

The district court denied Petitioner's counseled 28 U.S.C. § 2254 capital habeas petition and denied in full a certificate of appealability (COA). We grant a COA as to the following debatable issues. *See* 28 U.S.C. § 2253(c); *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Specifically, did the district court err in:

(i) Reviewing the petition under the standards of the Anti-Terrorism and Effective Death Penalty Act (the AEDPA)? Does *Woodford v. Garceau*, 538 U.S. 202 (2003), foreclose Petitioner's argument that pre-AEDPA law should apply because Petitioner reasonably relied to his detriment on a local rule?

(ii) Denying Claim 2 that counsel was ineffective in failing to present mitigating evidence of fetal distress syndrome, head injuries, and organic brain damage?

(iii) Denying Claim 4 that counsel was ineffective based upon attorney Pierpont's alleged conflict of interest due to his former representation of Detective Singleton? Was Petitioner prejudiced when attorney Pierpont in closing argument praised Detective Singleton and stated the Detective should be believed in everything he said?

(iv) Denying Claim 7 that counsel was ineffective at the penalty phase for failing to elicit from Petitioner's girlfriend that when Petitioner confessed to her, Petitioner said the killing occurred during an argument about drugs and after the victim made a comment about criminals?

(v) Denying Claim 11 that the prosecutor committed misconduct when allegedly he injected his personal opinion and informed the jury that he personally would vote for death?

(vi) Denying Claim 12 that the prosecutor committed misconduct, and trial counsel was ineffective for failing to object, when in closing argument the prosecutor repeatedly reminded the jury, without objection from defense counsel, that the voters of California demand the death penalty? *Cf. Weaver v. Bowersox*,

438 F.3d 832 (8th Cir. 2006) (Eighth Circuit affirmed the grant of relief in a post-AEDPA case, concluding the prosecutor, by repeatedly arguing that the jury had a duty to society to impose the death penalty, had diminished the jury's sense of responsibility for its sentence).

We decline to grant a COA on any of the other issues. The opening brief is due April 24, 2014. The answering brief is due June 24, 2014. The reply brief is due within 21 days after service of the answering brief.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

GUY KEVIN ROWLAND,

Petitioner,

v.

KEVIN CHAPPELL, Warden,

Respondent.

_____/

No. C 94-3037 WHA

**ORDER GRANTING SUMMARY JUDGMENT FOR RESPONDENT**

Petitioner Guy Kevin Rowland, a California state prisoner sentenced to death, seeks a writ of habeas corpus under 28 U.S.C. 2254. Respondent now moves for summary judgment on all of petitioner's claims. For the following reasons, respondent's motion is **GRANTED.**

## FACTUAL BACKGROUND[1]

On February 11, 1987, petitioner Guy Kevin Rowland was charged with one count of first-degree murder with the special circumstance that the murder took place during the commission of rape and one count of rape. The information alleged 12 prior felony convictions and that petitioner was on parole when he committed the offense.

Petitioner was represented at trial by attorneys Charles Pierpont and James Courshon.

[1] These facts are taken from *People v. Rowland*, 4 Cal. 4th 238 (1992). Under 28 U.S.C. 2254(e)(1), the factual findings made by the California Supreme Court are presumptively correct.

Evidence at trial established that on March 16, 1986, Marion Geraldine ("Geri") Richardson went to the "Wild Idle" bar in Byron, Contra Costa County.[2] Geri lived with her mother in Byron and worked as a cook at the Boys' Ranch. She regularly snorted methamphetamine and evidently had a vial of the substance in her possession.

Petitioner was also at the bar. He socialized with Geri for a while. According to an off-duty bartender, petitioner was "coming on" to Geri, but she did not respond positively. Before 10 p.m., petitioner left the bar. Some time later, Geri told her friend, Jeanne Weems, that she had a terrible headache and needed to go home to get some sleep as she had to go to work early the next morning. She left the bar alone. Apparently, she drove away in her car. Her vehicle was later seen parked at an odd angle about half a block from the bar. It was empty and unlocked.

In the hours that followed, petitioner brutally beat Geri about the head, face and elsewhere. He also had intercourse with her, evidently against her will. According to expert testimony, Geri had a bruise on her inner thigh which could have been caused by someone using a knee to force the knees apart. Petitioner also choked Geri twice, killing her the second time. Before her death, Geri ingested a potentially lethal dose of methamphetamine. It appears that petitioner put the methamphetamine in her mouth, as apparently she could not have snorted the requisite amount of the substance or would not have done so voluntarily.

Petitioner hauled Geri's body in his truck to the vicinity of Half Moon Bay, dragged it across the ground and dumped it in the ocean. On March 17, at around 7 a.m., petitioner arrived at the house of his lover, Susan Lanet, in Livermore. He appeared disturbed and said he wanted to leave the state. Petitioner and Lanet shared some methamphetamine. He admitted to Lanet that he had killed Geri and asked her whether she wanted Geri's belongings, including a ring and make-up. Lanet declined. Petitioner offered her $20 to clean his truck and remove "blood and every strand of hair." Lanet pretended to accept, but then called the police. Petitioner was arrested as he attempted to flee. At around 9:45 a.m., Geri's body was found at the base of a

[2] The parties refer to the victim as "Geri"; the state court opinion refers to her as "Marion R."

cliff by Moss Beach near Half Moon Bay. Blood and other evidence in petitioner's vehicle tied him to the killing.

At the guilt phase of the trial, petitioner did not present any evidence, call witnesses or take the stand. His primary defense was that the evidence did not establish first-degree murder or rape. On May 13, 1987, the jury convicted petitioner of first-degree murder and rape and also found true the special circumstance allegation of felony murder in the course of rape.

During the penalty phase, the prosecution offered in aggravation: (1) the circumstances of the offenses, (2) other criminal activity perpetrated by petitioner, and (3) his prior felony convictions. As to other violent criminal activity, the prosecution presented evidence during the penalty phase to the following effect:

On April 4, 1978, petitioner entered the residence of Harriet Larson in San Ramon. Attempting to escape, he battered Larson, who was 63 years old. She suffered a crushed vertebra and was hospitalized for 11 days.

On October 4, 1980, petitioner lured 26 year-old Tereza V. out of a bar in Pleasanton to a park with an offer to share cocaine. At the park, he made sexual advances. She rebuffed him. He assaulted, battered and raped her.

On November 7, 1980, together with a male partner, petitioner lured Lisa V. and Caren F. into a truck in Fremont with a false offer of a ride. Both girls were 13 years old. Petitioner and his counterpart then kidnapped the girls. Caren escaped. Petitioner helped his partner rape Lisa twice. He raped her six times, caused her to orally copulate him, sodomized her twice, and fondled her. During the attack, he threatened her with death if she resisted.

On March 11, 1986, petitioner got into an argument with his step-sister, Keli T., in the home she shared with her mother and stepfather in Pleasanton. They argued about the locking of a door. The underlying cause, however, was apparently something else: petitioner had expressed a romantic interest in Keli. She responded with antagonism. During the argument, petitioner picked up a knife and punched his fist through the door of Keli's bedroom. Petitioner assaulted her and threatened her with death.

On March 11, 1986, petitioner was introduced to Patricia G. by Susan Lanet at Lanet's

home. The trio used methamphetamine. Later, petitioner offered to drive Patricia G. home. Instead, he drove her to the top of a cliff that loomed over a body of water. During the trip, he beat her. At the cliff, he pulled her out of the car, beat her, told her he was going to kill her and throw her body off the cliff. He told her to undress. She complied. He continued to beat and choke her. Although the matter is uncertain, he may have raped her. He then drove her to his mother's house, where he kept her in the bathroom against her will for a time period. He called Lanet and admitted what he had done. Petitioner asked Patricia for some time before she called the police and then fled.

As to prior felony convictions, the prosecution presented evidence that petitioner was convicted on June 8, 1981, of the following offenses arising out of the Lisa V./Caren F. incident: two counts of sodomy, one count of lewd and lascivious conduct with a child under fourteen years of age, and one count of oral copulation.

In mitigation, petitioner offered evidence to the following effect. He was born into a middle class family in 1961. He had a brother and two sisters and was at least of average intelligence. His parents had a violent, alcoholic marriage. His mother, especially, neglected and abused him. She twice attempted to drown him in the bathtub when he was a baby. As a toddler, he experienced night terrors and convulsions. At a young age, he commenced psychotherapy and drug therapy. In school, he experienced learning disabilities and behavioral problems. With time, he started to abuse alcohol and drugs. He went on to spend time in correctional facilities. At various points in life, petitioner was diagnosed with various mental conditions, including hyperactivity. At the time of trial, when he was 26, petitioner was diagnosed with borderline personality disorder.

Petitioner also offered the background of members of his family. His parents each came from violent, alcoholic backgrounds. His mother was sexually molested by her father. His father, at age eleven, was given gifts in exchange for sexual favors by a neighborhood man. Petitioner's mother once put his sister's head in the oven when she was a baby and turned the gas on. His father later sexually molested that same sister. Under the influence of alcohol, his father abused his mother.

Following deliberations after the penalty phase, the jury returned a verdict of death for the murder of Geri.

## PROCEDURAL BACKGROUND

The California Supreme Court affirmed petitioner's conviction on December 17, 1992, *Rowland*, 4 Cal. 4th at 238, and summarily denied his petition for a writ of habeas corpus on June 1, 1994. On June 28, 1996, petitioner filed a federal habeas petition. This petition was later amended to delete unexhausted claims. An amended petition containing newly exhausted claims was filed on August 6, 1997. Respondent filed an answer on October 16, 1997. On January 16, 1998, petitioner filed a traverse.

On August 15, 2002, an order herein determined that claims 6, 8 and 10, as well as portions of claims 13 and 14, were procedurally defaulted. Subsequent orders ruled that petitioner had failed to demonstrate cause and prejudice to overcome the defaults. On November 30, 2005, petitioner filed a motion to once again amend his petition. The motion was granted. The third amended petition was filed on October 29, 2007. A corrected copy was filed on November 19, 2007. An amended answer was filed on March 24, 2008. An amended traverse was filed on September 16, 2009.

Respondent now brings a motion for summary judgment on all claims in the petition. Petitioner opposes respondent's motion and requests an evidentiary hearing on all claims.

## LEGAL STANDARDS

### 1. THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT

AEDPA applies to this case because petitioner filed his original habeas petition on June 28, 1996, several months after the enactment of the AEDPA.[3] *See Woodford v. Garceau*, 538

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[3] This court has already held that AEDPA applies to this case. *See* Order Regarding Cause and Prejudice filed September 14, 2010. Nonetheless, petitioner now maintains that AEDPA does not apply. Petitioner recognizes that he filed his petitioner after AEDPA's effective date, but argues that because he filed a motion for stay of execution prior to AEDPA's effective date, AEDPA should not apply. Petitioner is wrong. As the Supreme Court made clear in *Woodford v. Garceau*, the filing of a motion for stay, appointment of counsel, and/or a statement of non-frivolous claims does not constitute a filing of a petition under AEDPA. 538 U.S. 202, 208-10 (2003). Rather, the triggering date is the filing of the original petition, which petitioner does and must acknowledge was filed on June 28, 1996, after the enactment of AEDPA, and thus subject to its requirements.

U.S. 202, 206 (2003). Pursuant to AEDPA, a district court may not grant a writ of habeas corpus with respect to any claim that was adjudicated on the merits in state court unless the state court's adjudication of the claim: "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. 2254(d). A federal court must presume the correctness of the state court's factual findings, and the presumption of correctness may only be rebutted by clear and convincing evidence. 28 U.S.C. 2254(e)(1).

The "contrary to" and "unreasonable application" clauses of Section 2254(d) have separate and distinct meanings. A state court's decision is "contrary to" clearly established United States Supreme Court law if it fails to apply the correct controlling authority or if it applies the controlling authority to a case involving facts materially indistinguishable from those in a controlling case, but nonetheless reaches a different result. *See Williams v. Taylor*, 529 U.S. 362, 404, 413-14 (2000). A decision is an "unreasonable application" of United States Supreme Court law if "the state court identifies the correct governing legal principle . . . but unreasonably applies that principle to the facts of the prisoner's case." *Id.* at 414. In *Harrington v. Richter*, the Supreme Court further clarified that "'an *unreasonable* application of federal law is different from an *incorrect* application of federal law.'" 131 S. Ct. 770, 785 (2011) (citing *Williams*, 529 U.S. at 410) (emphasis in original). "A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." *Id.* at 786 (citing *Yarborough v. Alvarado*, 541 U.S. 653, 664 (2004)).

"[A] federal habeas court may not issue the writ simply because the court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must be objectively unreasonable." *Lockyer v. Andrade*, 538 U.S. 63, 75-76 (2003). "While the 'objectively unreasonable' standard is not self-explanatory, at a minimum it denotes a great[] degree of

deference to the state courts." *Clark v. Murphy*, 331 F.3d 1062, 1068 (9th Cir. 2003).

Holdings of the Supreme Court at the time of the state court decision are the only definitive source of clearly established federal law under AEDPA. *See Williams*, 529 U.S. at 412. While circuit law may be "persuasive authority" for purposes of determining whether a state court decision is an unreasonable application of Supreme Court law, only the Supreme Court's holdings are binding on the state courts and only those holdings need be reasonably applied. *See Clark*, 331 F.3d at 1070.

When a federal court is presented with a state court decision that is unaccompanied by a rationale for its conclusions, there is no basis other than the record "for knowing whether the state court correctly identified the governing legal principle or was extending the principle into a new context." *Delgado v. Lewis*, 223 F.3d 976, 982 (9th Cir. 2000). In such situations, federal courts must conduct an independent review of the record to determine whether the state court decision is objectively unreasonable. *Ibid.* Specifically, "where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." *Richter*, 131 S. Ct. at 784.

While federal courts "'are not required to defer to a state court's decision when that court gives [them] nothing to defer to, [they] must still focus primarily on Supreme Court cases in deciding whether the state court's resolution of the case constituted an unreasonable application of clearly established federal law.'" *Greene v. Lambert*, 288 F.3d 1081, 1089 (9th Cir. 2002) (quoting *Fisher v. Roe*, 263 F.3d 906, 914 (9th Cir. 2001)). Furthermore, independent review of the record is not *de novo* review of the constitutional issue, but rather the only way a federal court can determine whether a silent state court decision is objectively unreasonable. *Himes v. Thompson*, 336 F.3d 848, 853 (9th Cir. 2003).

Even if a petitioner meets the requirements of Section 2254(d), habeas relief is warranted only if the constitutional error at issue had a substantial and injurious effect or influence in determining the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993). Under this standard, petitioners "may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted

in 'actual prejudice.'" *Brecht*, 507 U.S. at 637 (citing *United States v. Lane*, 474 U.S. 438, 439 (1986)).

**2. EVIDENTIARY HEARING UNDER AEDPA**

In his opposition to respondent's motion for summary judgment, petitioner requests an evidentiary hearing on every claim.

Section 2254(d), as amended by AEDPA provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. 2254(d). The Supreme Court held in *Cullen v. Pinholster* that "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." 131 S. Ct. 1388, 1398 (2011).

While the central holding of *Pinholster* pertains to Section 2254(d)(1), the Supreme Court unambiguously observed that "§ 2254(d)(2) includes the language 'in light of the evidence presented in the State court proceeding,'" providing "additional clarity" that review under Section 2254(d)(2) is limited to the state court record. *Pinholster*, 131 S. Ct. at 1400 n.7. A reviewing court is, therefore, no more able to consider new evidence developed at a federal evidentiary hearing when determining whether a petitioner has satisfied Section 2254(d)(2) than it is when considering Section 2254(d)(1). Thus, while a federal court may continue to consider new evidence when applying *de novo* review, such review is available only after a petitioner has satisfied Section 2254(d). *See Panetti v. Quarterman*, 551 U.S. 930, 953-54 (2007) (holding that when "the requirement set forth in § 2254(d)(1) is satisfied[, a] federal court must then resolve the claim without the deference AEDPA otherwise requires"); *Maxwell v. Roe*, 628 F.3d

486, 494-495 (9th Cir. 2010) ("[W]hen a state court adjudication is based on an antecedent unreasonable determination of fact, we proceed to consider the petitioner's related claim de novo"); *Frantz v. Hazey*, 533 F.3d 724, 735 (9th Cir. 2008) (holding that where "there is [§ 2254(d)(1)] error, we must decide the habeas petition by considering de novo the constitutional issues raised"). Moreover, even where a petitioner has had no hearing on his claim in state court, the federal court must consider whether his claim could satisfy Section 2254(d) before holding a hearing. *See Schriro v. Landrigan*, 550 U.S. 465, 474 (2007). Thus, this order finds that petitioner Rowland must satisfy the requirements of Section 2254(d) on the basis of the state court record before he may show that he is entitled to an evidentiary hearing.

**3. SUMMARY JUDGMENT**

Summary judgment is appropriate where the moving party demonstrates "that there is no genuine issue as to any material fact and that the party is entitled to judgment as a matter of law." Fed. R. Civ. Pro. 56(c); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The motion should not be granted, however, if a reasonable trier of fact, viewing the evidence in the light most favorable to the non-moving party, could resolve a material issue in the nonmoving party's favor. *See ibid.* at 248-49; *Barlow v. Ground*, 943 F.2d 1132, 1134-36 (9th Cir. 1991).

**4. INEFFECTIVE ASSISTANCE OF COUNSEL**

The Sixth Amendment guarantees the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To prevail on a claim of ineffective assistance of counsel, petitioner must show both that counsel's performance was deficient and that the deficient performance prejudiced petitioner's defense. *Ibid.* at 688. To prove deficient performance, petitioner must demonstrate that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. *Ibid.; see also Bobby v. Van Hook*, 130 S. Ct. 13, 18 (2009) (*per curiam*) (noting that guidelines, such as those promulgated by the American Bar Association, purporting to establish what reasonable attorneys would do may be helpful but are not the test for determining whether counsel's choices are objectively reasonable). This requires showing that counsel made errors so serious that counsel was not

functioning as the "counsel" guaranteed by the Sixth Amendment. *See Strickland*, 466 U.S. at 687-88.

The relevant inquiry is not what defense counsel could have done, but rather whether the choices made by defense counsel were reasonable. *See Babbitt v. Calderon*, 151 F.3d 1170, 1173 (9th Cir. 1998). Judicial scrutiny of counsel's performance must be highly deferential, and a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *See Strickland*, 466 U.S. at 689; *Wildman v. Johnson*, 261 F.3d 832, 838 (9th Cir. 2001); *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994). The reasonableness of counsel's decisions must be measured against the prevailing legal norms at the time counsel represented the defendant. *Wiggins v. Smith*, 539 U.S. 510, 522-23 (2003); *see also Jennings v. Woodford*, 290 F.3d 1006, 1016 (9th Cir. 2002) (finding deficient performance where counsel who had settled on alibi defense failed to investigate possible mental defense despite state supreme court decision before trial that in such instances counsel is not excused from investigating the potential mental defense). A difference of opinion as to trial tactics does not constitute denial of effective assistance, *see United States v. Mayo*, 646 F.2d 369, 375 (9th Cir. 1981), and tactical decisions are not ineffective assistance simply because in retrospect better tactics are known to have been available. *See Bashor v. Risley*, 730 F.2d 1228, 1241 (9th Cir.).

Under AEDPA, "[t]he pivotal question is whether the state court's application of the *Strickland* standard was unreasonable. This is different from asking whether defense counsel's performance fell below *Strickland*'s standard." *Richter*, 131 S. Ct. at 785. The state decision under review need not explain the state court's reasoning, and the habeas petitioner still bears the burden to show there was no reasonable basis for the state court to deny relief. *Id.* at 784.

To prove counsel's performance was prejudicial, petitioner must demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. A petitioner must show that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

*Id.* at 688. The test for prejudice is not outcome-determinative, *i.e.*, defendant need not show that the deficient conduct more likely than not altered the outcome of the case; however, a simple showing that the defense was impaired is also not sufficient. *Id.* at 693.

The *Strickland* prejudice analysis is complete in itself. Therefore, there is no need for additional harmless error review pursuant to *Brecht*, 507 U.S. at 637. *Musladin v. Lamarque*, 555 F.3d 830, 834 (9th Cir. 2009); *Avila v. Galaza*, 297 F.3d 911, 918 n.7 (9th Cir. 2002).

## ANALYSIS

### 1. CLAIM 1

In Claim 1, petitioner maintains that his trial attorneys were ineffective for failing to investigate and present potentially meritorious mental defenses at the guilt phase. This claim was raised in petitioner's first state habeas petition and denied on the merits in a summary opinion by the California Supreme Court.

Petitioner is unable to cite to any clearly established federal law that would entitle him to relief, and a review of the record does not demonstrate that the state court was objectively unreasonable in denying this claim. As discussed *supra*, in order to establish ineffective assistance of counsel, petitioner must show both that counsel's performance was deficient and that the deficient performance prejudiced petitioner's defense. *Strickland*, 466 U.S. at 688. To prove deficient performance, petitioner must demonstrate that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. *Ibid.* To prove counsel's performance was prejudicial, petitioner must demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Ibid.* at 694.

The United States Supreme Court and the Ninth Circuit have affirmed that adequate counsel in a capital case has an "obligation to conduct a thorough investigation of the defendant's background." *Wiggins*, 539 U.S. at 522. At a minimum, counsel must conduct a reasonable investigation enabling him or her to make informed decisions as to how best represent his or her client. *Sanders*, 21 F.3d at 1457.

> Although counsel is obligated to investigate a capital defendant's background, it is:
>
> clearly within the 'wide range of professionally competent assistance' for [defense counsel] to choose not to present a psychiatric defense theory that might conflict with [other defenses and/or mitigation]. It is also acceptable trial strategy to choose not to call psychiatrists to testify when they can be subjected to cross-examination based on equally persuasive psychiatric opinions that reach a different conclusion.

*Harris v. Vasquez*, 949 F.2d 1497, 1525 (9th Cir. 1990).

Here, petitioner has not established that his defense counsel failed to conduct an adequate investigation into his mental health. The record establishes that on May 28, 1986, well before petitioner's trial began in March 1988, defense counsel retained psychiatrist Dr. George Wilkinson to conduct an examination of petitioner (Exh. 21 of App. No. 16). As petitioner acknowledges, Dr. Wilkinson concluded prior to trial that there was no viable mental defense. Petitioner's Amended Reply to Respondent's Answer to Third Amended Petition at 17.

In August 1986, defense counsel also retained psychologist Dr. Albert Fricke, who conducted psychological testing of petitioner (Exhs. 23 and 49 of App. No. 16). In addition, defense counsel sent an investigator to interview Dr. Arthur Mattocks, a mental health professional who had treated petitioner at the California Medical Facility (Exh. 24 of App. No. 16). Finally, defense counsel retained Dr. Hugh Ridlehuber to evaluate petitioner for ADHD in February 1988 (approximately one month before the start of the guilt-phase trial) at the suggestion of Drs. Wilkinson and Fricke, because Dr. Ridlehuber was considered a local expert on the subject (Exhs. 50 & 51 of App. No. 16). Dr. Ridlehuber was retained after the guilt phase as well to conduct an in-depth examination of petitioner and to testify regarding his mental health at the penalty phase. None of the doctors testified at the guilt phase.

The gravamen of petitioner's claim is that his counsel ought to have retained Dr. Ridlehuber earlier and instructed him to conduct a full examination of petitioner prior to the guilt phase. While Dr. Ridlehuber testified at the penalty phase that petitioner suffered a borderline personality disorder, he also testified that he found no evidence of organic brain dysfunction or schizophrenia (RT 6757, 6769, 6796-97). He has since stated, however, in a

declaration that was before the California Supreme Court at the time it considered and rejected this claim, that had he been able to thoroughly examine petitioner prior to the guilt phase, he would have "advised defense counsel to seriously consider legal insanity as a defense during the guilt phase of trial" (Exh. No. 50 of App. No. 16 at 5).

The investigation conducted by counsel was reasonable under the circumstances. *See Siripongs v Calderon*, 133 F.3d 732, 736 (9th Cir. 1998) (stating the "[t]he relevant inquiry under *Strickland* is not what defense counsel could have pursued, but rather whether the choices made by defense counsel were reasonable.") The record confirms that petitioner's counsel explored the possibility of a mental defense by retaining and consulting with multiple mental health professionals. Dr. Ridlehuber acknowledged that neither Dr. Fricke nor Dr. Wilkinson believed that there was a psychiatric defense available to petitioner (Exh. 51 of App. No. 16 at 3), and it was reasonable for defense counsel to rely on their expertise. Additionally, Dr. Fricke has averred — in a declaration that was before the California Supreme Court at the time it considered and rejected this claim — that he met with petitioner three times and conducted various tests. Dr. Fricke has further declared that based on the testing and analysis that he performed on petitioner, as well as that done by Dr. Wilkinson, Dr. Fricke did not find, *inter alia* "cognitive deficits suggestive of other neurological problems" (Exh. 49 of App. No. 16 at 3-4). The fact that Dr. Ridlehuber now declares that he would have suggested the consideration of a defense of legal insanity had he been retained earlier does not mean that the investigative choices that counsel *did* make were unreasonable, and petitioner can cite to no decisions so establishing.

"In assessing the reasonableness of an attorney's investigation, . . . a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins*, 539 U.S. at 537. Having reviewed the record of this case, this order finds that it was reasonable for petitioner's counsel not to retain additional mental health professionals, and there was no cause for counsel to have retained Dr. Ridlehuber prior to the time that they did. That counsel arranged for multiple mental health professionals to evaluate petitioner confirms that they considered a

mental defense well before trial commenced. A statement by Dr. Ridlehuber that he may have disagreed with the other experts had he been retained earlier does not establish ineffective assistance of counsel. As the Supreme Court has recognized, "psychiatrists disagree widely and frequently on what constitutes mental illness," *Ake v. Oklahoma*, 470 U.S. 68, 81 (1985), and *Strickland* and its progeny command only that defense counsel conduct a thorough and reasonable investigation, not that they continue to consult with experts indefinitely until one is found to support a particular defense.

Accordingly, this order finds and concludes that petitioner has not demonstrated that his counsel were deficient in their investigation of his mental health nor in their conduct regarding potential presentation of mental health evidence at his guilt phase trial. While it is not required to do so, this court also finds that petitioner cannot show prejudice as a result of counsel's actions. The United States Supreme Court has never required defense counsel to pursue every nonfrivolous claim or defense, regardless of its merit, viability, or realistic chance of success. *Knowles v. Mirzayance*, 556 U.S. 111, 125, 127 (2009). And attempting to establish an insanity defense at the guilt phase trial may well have opened the door to the prosecution introducing evidence of petitioner's history of violent sex offenses, thereby negating any possible advantage of an insanity defense. *See, e.g. Brodit v. Cambra*, 350 F.3d 985, 994 (9th Cir. 2003) (finding that state court reasonably concluded that trial attorney provided effective assistance of counsel where attorney declined to present evidence favorable to defense out of concern that it would open door to unfavorable evidence).

Because petitioner cannot establish either that his counsel's performance was deficient or that any alleged deficiencies were prejudicial, and given that a reviewing court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance, petitioner has not satisfied the requirements of Section 2254(d) and both his claim and his request for an evidentiary hearing must be denied. *Strickland*, 466 US at 688; *Sanders*, 21 F.3d at 1456. Respondent's motion for summary judgment on this claim is granted.

2. CLAIM 2

In Claim 2, petitioner maintains that his trial attorneys were ineffective for failing to investigate and present mitigating psychiatric evidence at the penalty phase trial. Specifically, petitioner argues that trial counsel contacted Dr. Ridlehuber (who testified at the penalty phase) too late and failed to provide him with important evidence. As a result, according to petitioner, strong mitigating evidence was not presented to the penalty phase jury. This claim was raised in petitioner's first state habeas petition and denied on the merits in a summary opinion by the California Supreme Court.

Petitioner is unable to cite to any clearly established federal law that would entitle him to relief, and a review of the record does not demonstrate that the state court was objectively unreasonable in denying this claim. As discussed *supra*, in order to establish ineffective assistance of counsel, petitioner must show both that counsel's performance was deficient and that the deficient performance prejudiced petitioner's defense. *Strickland*, 466 U.S. at 688. To prove deficient performance, petitioner must demonstrate that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. *Ibid.* To prove counsel's performance was prejudicial, petitioner must demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Ibid.* at 694.

Trial counsel has a duty to investigate in capital penalty phase proceedings. *Summerlin v. Schriro*, 427 F.3d 623, 629-30 (9th Cir. 2005). Our Court of Appeals has also held that, in order to prepare for the penalty phase of a capital trial, capital counsel "must conduct sufficient investigation and engage in sufficient preparation to be able to present and explain the significance of all the mitigating evidence." *Mayfield v. Woodford*, 270 F.3d 915, 927 (9th Cir. 2002 (*en banc*) (citations omitted).

This order has already addressed petitioner's contention that Dr. Ridlehuber was hired too late in its discussion of Count 1, *supra*. Petitioner's attorneys retained a psychiatrist and a psychologist, and then Dr. Ridlehuber himself examined petitioner and testified extensively at the penalty phase. In fact, Dr. Ridlehuber himself testified that he interviewed and examined

petitioner for 12 hours and researched the case for an additional 14 hours (RT 6755). The record does not reflect, however, that Dr. Ridlehuber indicated to counsel at the time he was retained or at the time of the penalty phase trial that he believed that he had not had adequate time to examine petitioner or that he had been retained too late to perform a thorough evaluation.

Trial counsel in capital cases are required to conduct a thorough investigation of a defendant's background, but they are *not* required to hire any particular mental health professional, nor, as stated, are they required to consult multiple doctors until one is found who will advocate a psychiatric defense. Given counsel's retention of multiple mental health experts and the corresponding investigation into petitioner's mental health, petitioner cannot demonstrate that it was ineffective assistance for his counsel not to have specifically retained Dr. Ridlehuber at an earlier time. *Strickland*, 466 U.S. at 688; *Siripongs*, 133 F.3d at 736.

Petitioner also argues that his trial counsel did not properly prepare Dr. Ridlehuber or provide him with necessary information about petitioner. Inadequate preparation of a defense mental health expert witness can amount to deficient performance. *See, e.g., Bean v. Calderon*, 163 F.3d 1079, 1078 81 (9th Cir. 1998). Moreover, counsel in a capital case have a duty to provide background information to their penalty phase mental health expert, even if the expert does not request such evidence. *Wallace v. Stewart*, 184 F.3d 1112, 1118 (9th Cir. 1999).

Here, however, defense counsel *did* investigate petitioner's background and provided Dr. Ridlehuber with multiple sources of information about petitioner. Dr. Ridlehuber testified that he reviewed petitioner's family history, information from a doctor who treated petitioner as a child, and reports from a defense investigator who had interviewed a number of petitioner's family members (RT 6755-6818). He interviewed both Drs. Fricke and Wilkinson — the psychologist and psychiatrist who had evaluated petitioner prior to the guilt phase — and reviewed petitioner's treatment in the California Medical Facility (RT 6783-6803). Dr. Ridlehuber's testimony also confirms that he knew about the history of violence, alcoholism and sexual abuse in petitioner's family and about incidents where petitioner's mother believed she attempted to drown petitioner (RT 6760-6812). Dr. Ridlehuber stated that petitioner

presented a reliable, complete and detailed picture of himself (RT 6818); Dr. Ridlehuber also noted that he was "compulsive" when evaluating a patient and preferred to have as many sources of information as possible, but never indicated that he felt he did not have adequate information to evaluate petitioner (RT 6755-6798).

Petitioner's assertion that earlier retention of Dr. Ridlehuber might have led to a different diagnosis of petitioner is belied by Dr. Ridlehuber's own testimony at trial and the factual record. For example, he declares that "[t]here is now information concerning the Rowland family's history of violence, alcoholism, and sexual abuse," (Exh. No. 50 of App. No. 16 at 7), but, as discussed above, the record confirms that Dr. Ridlehuber knew of these conditions and stated that they may have contributed to petitioner's mental health (RT 6760-61). Dr. Ridlehuber also declares that, had he had additional information, he would have performed additional tests to determine whether petitioner had suffered organic brain damage (Exh. No. 50 of App. No. 16 at 4-5. Exh. No. 51 at 6-11). Dr. Ridlehuber testified, however, that he tested petitioner for organic brain damage and found none (RT 6769-96); that he now would like to perform additional tests does not mean counsel's performance was deficient.

Petitioner fails to demonstrate that his counsel were ineffective in preparing for the penalty phase of his trial. As the record reflects and the discussion above confirms, petitioner's counsel retained Dr. Ridlehuber in addition to other mental health experts, and Dr. Ridlehuber testified extensively on petitioner's behalf at the penalty phase. Dr. Ridelhuber's own testimony confirms that his examination of petitioner was thorough and that he was provided with extensive records and information about petitioner's family background, criminal background, and health history. Dr. Ridlehuber also indicated that his examination of petitioner was extensive and did not state, at the time, that he had been retained too late to conduct an adequate examination and render his professional opinion. Accordingly, this order finds and concludes that petitioner's trial attorneys fulfilled their duty to seek out background information and provide it to the penalty phase mental health expert. *See Wallace*, 184 F.3d at 1118.

This order has concluded that counsel's investigation of petitioner's background and counsel's investigation of petitioner's mental health status were reasonable under the

circumstances and did not constitute deficient performance. As such, this order is not required to conduct a prejudice analysis of those claims. *See, e.g., Siripongs*, 1333 F.3d at 737. Nonetheless, the court finds that, even had counsel's performance been deficient, none of the alleged errors were prejudicial to petitioner's penalty phase defense. Any additional evidence of petitioner's family background appears to be duplicative of that already in Dr. Ridlehuber's possession at the time of trial, since he testified as to violence, alcoholism and sexual abuse in petitioner's family.

Moreover, the government's case in aggravation was extremely strong. The jury was presented with evidence showing, for example, that petitioner had been convicted of mutliple sexual assault felonies, including sodomy, against a 13-year old girl. Petitioner cannot show that additional testimony from Dr. Ridlehuber regarding his mental diagnoses or his family background would been enough to overcome the strong case in aggravation or, given the circumstances of the crime for which petitioner was convicted, would have persuaded the jury to be lenient. Petitioner has not demonstrated anything that sufficiently undermines the court's confidence in the fairness of the death verdict. *See, e.g., Wong v. Belmontes*, 130 S.Ct. 383, 390 (2009) (finding no prejudice where the aggravation evidence was "simply overwhelming"); *Rhoades v. Henry*, 596 F.3d 1160, 1195 (9th Cir. 2010) (holding "that [petitioner's] newly proffered facts . . . add too little, and the aggravating circumstances are too strong, to make it reasonably probable that the sentencing decision would have been different but for counsel's performance"). In sum, the order finds and concludes that there was no reasonable probability that, absent counsel's alleged errors, the jury might have imposed a sentence of life without parole instead of death. Accordingly, this claim is denied, petitioner's request for an evidentiary hearing is denied and summary judgment is granted to respondent.

**3. CLAIM 3**

In Claim 3, petitioner maintains that the jury speculated that, if given a sentence of life without parole ("LWOP"), petitioner might still be released from prison. According to petitioner, the jury considered this as a factor supporting a sentence of death and committed misconduct as a result. This claim was raised in petitioner's first state habeas petition and

denied by the California Supreme Court on the merits in a summary opinion.

"[W]here a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." *Richter*, 131 S. Ct. at 784. Petitioner is unable to meet this burden.

Petitioner is unable to cite to any clearly established federal law that would entitle him to relief, and a review of the record does not demonstrate that the state court was objectively unreasonable in denying this claim. Instead, petitioner cites to decisions such as *Furman v. Georgia*, 408 U.S. 238 (1972) and *Mattox v. United States*, 146 U.S. 140 (1892) for the general principle that capital juries are precluded from considering outside evidence.

These decisions do not support petitioner's claim that it was reversible misconduct for the jury to allegedly speculate that a sentence of LWOP might mean that petitioner could still be released from prison at some point. While there is no decision directly on point, the Supreme Court has considered the constitutionality of California's *Briggs* instruction, which informed capital jurors that the state governor could commute or modify a sentence of LWOP, but did not inform capital jurors that a sentence of death could also be commuted or modified. *California v. Ramos*, 463 U.S. 992 (1983). The Court upheld the instruction, finding that a jury's consideration of the commutation power did not undermine the jury's sentencing responsibility nor "impermissibly inject an element too speculative for the jury's deliberation;" furthermore, failure to inform the jury of the gubernatorial power to also commute death sentences did not render the instruction unconstitutional. *Ibid.* at 1012-13.

Petitioner is correct that a *Briggs* instruction was not given in his case. Nonetheless, *Ramos* is relevant. If the Supreme Court has held that a capital jury may be specifically instructed that it is allowed to consider gubernatorial commutation powers of a LWOP sentence, then petitioner cannot – absent clearly established federal law to the contrary – demonstrate that the jury's speculation regarding such a possibility is prejudicial error. Petitioner cannot meet the requirements of Section 2254(d), and respondent is entitled to summary judgment on this claim.

**4. CLAIM 4**

In Claim 4, petitioner alleges that one of his attorneys at trial, Charles Pierpont, had a conflict of interest that was not revealed to petitioner or waived by him. According to petitioner, this conflict violated his rights to conflict-free counsel under the Fifth, Sixth, Eighth and Fourteenth Amendments. This claim was raised in petitioner's first state habeas petition and was denied on the merits by the California Supreme Court.

Petitioner alleges that attorney Pierpont knew Detective Mifflin Singleton, a chief investigating officer and testifying witness in the case against petitioner, from his time as a Deputy District Attorney in the San Mateo District Attorney's Office. According to petitioner, Detective Singleton and attorney Pierpont remained friends during the time of petitioner's trial, and attorney Pierpont or his legal partner had represented Detective Singleton in several civil suits, including a divorce action. This relationship was allegedly not revealed to petitioner. Petitioner concedes that Pierpont's representation of Singleton terminated in October 1986, before the commencement of trial in this case; Pierpont did, however, cross-examine Singleton in the preliminary hearing on September 15, 1986. Petitioner maintains that, because Singleton was a social friend and legal client of Pierpont, he had an actual conflict of interest that prejudiced petitioner's defense.

The Sixth Amendment's right to conflict-free counsel is violated only if the conflict "adversely affected" trial counsel's performance. *Alberni v. McDaniel*, 458 F.3d 860, 870 (9th Cir. 2006). "[A]n actual conflict of interest mean[s] precisely a conflict that affected counsel's performance – as opposed to a mere theoretical division of loyalties." *Mickens v. Taylor*, 535 U.S. 162, 171 (2002) (emphasis omitted).

A conflict of interest can arise when counsel represents multiple defendants whose interests are hostile to one another. In order to establish a violation of the Sixth Amendment, a petitioner "who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *See Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980) (footnote omitted); *accord Mickens*, 535 U.S. at 171; *Paradis v. Arave*, 130 F.3d 385, 391 (9th Cir. 1997); *United States v. Del Muro*, 87 F.3d 1078, 1080 (9th Cir. 1996); *Sanders*, 21 F.3d at 1452. An "actual conflict" is not separate from an "adverse effect;" rather, it is defined as one

which adversely affects the lawyer's performance. *Earp v. Ornoski*, 431 F.3d 1158, 1183 (9th Cir. 2005) (quoting *Mickens*, 535 U.S. at 172 n.5).

An "actual conflict of interest" only occurs when counsel "actively represented conflicting interests." *Strickland*, 466 U.S. at 692. A theoretical or potential conflict is insufficient to constitute actual conflict; instead counsel must have actively represented conflicting interests. *Cuyler*, 446 U.S. at 350 (holding that "the possibility of conflict is insufficient to impugn a criminal conviction"); *Bragg v. Galaza*, 242 F.3d 1082, 1087 (9th Cir. 2000), *amended*, 253 F.3d 1150 (9th Cir. 2001); *Morris v. California*, 966 F.2d 448, 455 (9th Cir. 1991). A petitioner must prove an actual conflict through a factual showing in the record. *Bragg*, 242 F.3d at 1087; *Morris*, 966 F.2d at 455.

Petitioner urges a finding of an "actual conflict" and thus a presumption of prejudice based on attorney Pierpont's relationship with Detective Singleton. The Supreme Court, however, has applied the presumption only to multiple representation cases, such as those cases where attorneys were representing multiple defendants at the same trial or defendants charged with the same murders in separate trials. *See, e.g. Cuyler*, 446 U.S. at 340-50. Petitioner can cite to no Supreme Court cases finding an actual conflict of interest where, as here, defense counsel previously represented a state witness in a civil matter completely unrelated to the criminal matter. Furthermore, petitioner also cannot demonstrate that any alleged conflict "significantly affected counsel's performance." *Mickens*, 533 U.S. at 172-73. As such, petitioner cannot demonstrate that an independent review of the record shows that the California Supreme Court's decision denying this claim was objectively unreasonable under clearly established federal law, or was based on an unreasonable determination of the facts. Summary judgment on this claim must be granted to respondent.

**5. CLAIM 5**

In Claim 5, petitioner alleges that both of his trial attorneys had an unconstitutional conflict of interest because they were both previously employed by the same district attorney's office that prosecuted petitioner. This claim was raised in petitioner's first state habeas petition and was denied on the merits by the California Supreme Court.

Petitioner maintains that his attorneys, Charles Pierpont and James Courshon, were former Deputy District Attorneys who had worked at the San Mateo District Attorney's Office at the same time as Martin Murray, the Deputy District Attorney responsible for prosecuting petitioner. According to petitioner, we should infer: 1) that his attorneys' previous employment caused his attorneys to view his case from the perspective of a prosecutor and; 2) that his attorneys had a personal relationship with prosecutor Murray that compromised their loyalty to petitioner and adversely impacted their conduct as trial counsel.

This claim is without merit. As discussed *supra*, in order to prevail on a claim of actual conflict of interest, a petitioner must demonstrate that his counsel "actively represented conflicting interests." *Strickland*, 466 U.S. at 692; *Cuyler*, 446 U.S. at 350 (holding that "the possibility of conflict is insufficient to impugn a criminal conviction"). A petitioner also must demonstrate that any alleged conflict "significantly affected counsel's performance." *Mickens*, 533 U.S. at 172-73. This petitioner cannot do. In addition, he cannot cite to any clearly established federal law holding that a defense attorney's prior employment as a prosecutor amounts to a conflict of interest, nor can he show that the state court decision denying this claim was based on an unreasonable determination of the facts. Accordingly, this claim must be denied and summary judgment is granted to respondent.

**6. CLAIM 6**

In Claim 6, petitioner maintains that he was denied a fair trial, due process of law, the effective assistance of counsel and the right to present a defense when the trial court ruled that if the entirety of petitioner's confession to Susan Lanet was admitted, evidence of petitioner's prior convictions would also be allowed into evidence. A prior order has already held that this claim is procedurally defaulted. *See* Order Granting Motion to Dismiss Claims 6, 8 and 10 As Defaulted, Aug. 15, 2002. Furthermore, another order has previously determined that petitioner cannot show either cause and prejudice or a miscarriage of justice sufficient to overcome the default. *See* Order Regarding Cause and Prejudice, Sept. 14, 2010. Petitioner has submitted nothing additional that would justify reconsideration of any previous decisions. Accordingly, this claim is denied and summary judgment is granted to respondent.

7. CLAIM 7

In Claim 7, petitioner maintains that he was denied effective assistance of counsel at the penalty phase of his trial. Specifically, he maintains that his attorneys should have elicited testimony from Susan Lanet regarding certain of petitioner's statements concerning an argument with the victim. The California Supreme Court denied this claim in a reasoned opinion on direct appeal, as follows:

> B. *Ineffective Assistance of Counsel*
>
> Defendant contends that trial counsel provided him with ineffective assistance under the Sixth Amendment to the United States Constitution by failing to call Susan Lanet as a witness in order to elicit his extrajudicial statement to the effect that he killed [Geri] after a fight unrelated to sex.
>
> To succeed in his claim, defendant must show (1) deficient performance under an objective standard of professional reasonableness and (2) prejudice under a test of reasonable probability. (E.g., *People v. Ledesma* (1987) 43 Cal 3d 171, 215-18 [parallel citations omitted].)
>
> Defendant fails in his attempt. Counsel's performance was not deficient because the omission was not unreasonable. In view of the evidence concerning the circumstances for the present offenses adduced at the guilt phase, counsel could properly have declined to reopen the matter – especially through a self-serving, out-of-court statement of the defendant. Moreover, even if counsel's performance has been deficient, it could not have subjected defendant to prejudice. There is no reasonable probabilty that the introduction of a statement of the sort here would have affected the outcome.[4]

*Rowland*, 4 Cal. 4th at 273-74.

Petitioner cannot demonstrate that anything in the state court's reasoned opinion denying this claim is contrary to, or an unreasonable application of, clearly established United States Supreme Court law. Nor can he show that the opinion was based on an unreasonable determination of the facts. As the state court concluded, counsel's performance was not deficient because it was not unreasonable for counsel to decide not to elicit this testimony from Lanet. *See Strickland*, 466 U.S. at 687-688. Petitioner cannot show that testimony from Lanet

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[4] [Opinion Footnote 15] Defendant claims that trial counsel's ineffective assistance under the Sixth Amendment entailed the violation of various provisions of the United States Constitution, including the due process clauses of the Fifth and Fourteenth Amendments; the trial clause of the Sixth Amendment; and the cruel and unusual punishments clause of the Eighth Amendment. But as shown, counsel's assistance was *not* ineffective.
. . .

that petitioner killed Geri after a fight, but that the fight was unrelated to sex, would have been helpful to his defense. In addition, even if petitioner had been able to show that counsel's behavior was deficient in this regard, he is unable to demonstrate prejudice. There is no reasonable probability that had this testimony been elicited, the jury would have been more likely to return a verdict of life without parole instead of death. *Strickland*, 466 U.S. at 694. Accordingly, this claim must be denied and summary judgment is granted to respondent. Petitioner's request for an evidentiary hearing on this claim is also denied.

**8. CLAIM 8**

In Claim 8, petitioner maintains that his due process and confrontation clause rights were violated by evidence of certain of the victim's statements. A prior order has already held that this claim is procedurally defaulted. *See* Order Granting Motion to Dismiss Claims 6, 8 and 10 As Defaulted, Aug. 15, 2002. Furthermore, a prior order has previously determined that petitioner cannot show either cause and prejudice or a miscarriage of justice sufficient to overcome the default. *See* Order Regarding Cause and Prejudice, Sept. 14, 2010. Petitioner has submitted nothing additional that would justify reconsideration of any previous decisions. Accordingly, this claim is denied and summary judgment is granted to respondent.

**9. CLAIM 9**

In Claim 9, petitioner maintains that there was insufficient evidence to support both the rape conviction and the special circumstance of murder during the commission of rape. The California Supreme Court denied this claim in a reasoned decision on direct appeal, as follows:

> *E. Sufficiency of the Evidence for the Rape Conviction*
>
> Defendant contends that the evidence is insufficient to support his conviction for rape.
>
> In reviewing the sufficiency of evidence under the due process clause of the Fourteenth Amendment to the United States Constitution, the question we ask is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact would have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 319 [parallel citations omitted].) To our mind, we must ask the same questions when we conduct such review under the due process clause of article I, section 15 of the California Constitution.
>
> A state court conviction that is not supported by sufficient evidence

violates the due process clause of the Fourteenth Amendment and is invalid for that reason. (*Jackson v. Virginia, supra,* 445 U.S. at pp. 313-324 [parallel citations omitted].) In our view, a California conviction without adequate support separately and independently offends, and falls under, the due process clause of article 1, section 5.

Defendant's claim is to the following effect: although the evidence is sufficient to prove that he engaged in sexual intercourse with [Geri], it is insufficient to prove that he did so while she was alive *or* without her consent.

Of course, in rape the act of sexual intercourse must involve a live victim. (*People v. Kelly* (1992) 1 Cal. 4th 495, 524 [parallel citations omitted]) who does not effectively consent (see Penal Code, § 261).

The evidence is more than sufficient on each point. To support our conclusion, we need cite only this. There was expert testimony that before death, [Geri] suffered a bruise "an inch or two above the [right] kneecap and somewhat towards the inside part of the thigh"; the location of the injury was "unusual"; such a bruise, however, could have been caused "if someone used a knee . . . to force the legs apart." Relying on that testimony, as it would plainly have been entitled to, a rational trier of fact would surely have found beyond a reasonable doubt that at the time defendant engaged in sexual intercourse, [Geri] was alive *and* did not consent.

Defendant argues to the contrary. His words establish nothing more than that some rational trier of fact might have made a different finding. That is not enough.[5]

*Rowland*, 4 Cal. 4th at 269-70.

The rejection of this claim by the state court was neither contrary to nor an unreasonable application of clearly established United States Supreme Court authority. In addition, the state court's decision was not based on an unreasonable determination of the facts. In his opposition to respondent's motion, petitioner does little more than cite to *Jackson v. Virginia*, 443 U.S. 307 (1979), the controlling decision regarding this issue and the decision relied upon by the California Supreme Court. He does not cite to any controlling authority demonstrating that the state court's decision was unreasonable, nor does he cite to any evidence in the record indicating that the state court relied on an unreasonable determination of the facts. To the contrary, as the California Supreme Court demonstrated, there was more than sufficient

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[5] [Opinion Footnote 8] Defendant claims that his rape conviction, [if] based on evidence that is insufficient for the due process clause of the Fourteenth Amendment, is invalid not only under the federal constitutional provision but under others as well – including some unspecified clause of the Sixth Amendment and, perhaps, the cruel and unusual punishments clause of the Eighth Amendment. The conviction is *not* based on insufficient evidence.

evidence for a rational trier of fact to conclude both that Geri was alive at the time of intercourse and that she did not consent. *Rowland*, 4 Cal. 4th at 270. Accordingly, petitioner cannot meet his burden under Section 2254(d), and respondent is entitled to summary judgment on this claim.

**10. CLAIM 10**

In Claim 10, petitioner maintains that he was denied effective assistance of counsel when his counsel failed to object to evidence regarding future conditions of confinement. The court has already held that this claim is procedurally defaulted. *See* Order Granting Motion to Dismiss Claims 6, 8 and 10 As Defaulted, Aug. 15, 2002. Furthermore, the court has previously determined that petitioner cannot show either cause and prejudice or a miscarriage of justice sufficient to overcome the default. *See* Order Regarding Cause and Prejudice, Sept. 14, 2010. Petitioner has submitted nothing additional that would justify the reconsideration of any previous decisions. Accordingly, this claim is denied.

**11. CLAIM 11**

In Claim 11, petitioner maintains that alleged misconduct of the prosecutor during closing argument violated petitioner's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. Specifically, petitioner contends that the prosecutor improperly expressed his personal opinion regarding the appropriateness of the death penalty. This claim was denied by the California Supreme Court in a reasoned opinion on direct appeal, as follows:

> Seventh, defendant complains of the concluding comments in the prosecutor's summation.
>
> ". . . And I've made a long practice in my life never to ask others to do what I would not feel is right, and what I would not do myself.
>
> "I believe strongly in the sanctity of human life, and I would not ask you to do something that I would not do. And I believe in human life. But I also believe that society has the right, in fact the duty to protect itself and to see that justice is done in the appropriate cases.
>
> "And based in the system of justice where the punishment should fit the crime and the criminal, based on the law in this case . . . , based on the savagery, and the brutality, and the horror of the crime against [Geri], based on his history of past criminal activity involving violence which represents a man of extreme cruelty, depravity, and violence, I now stand before you, and with a full realization of the awesome responsibility that's been entrusted to you and to me,

and with a full realization of the gravity and the enormity of what I am about to ask you, without reservation, without hesitation, I am asking that you return a verdict of death."

Outside the presence of the jury, defense counsel requested the court "to instruct the jury on one comment made by [the prosecutor]. And that went to his personal opinion in this matter concerning the sentence of death. I think that's improper under the cases. And I would ask the court to admonish the jury that they should not consider [the prosecutor's] personal feelings in arriving at the appropriate penalty."

The court refused. "I think the prohibition goes to personal belief in evidence, evidence not before the jury. And he very carefully didn't do that. I know of no rule of law to support the action you're requesting. I think it's an appropriate argument. He very carefully didn't imply that he knows something that the jury doesn't know. I think it's an appropriate argument.

We agree. True, a prosecutor may not "state his personal belief regarding . . . the appropriateness of the death penalty, *based on facts not in evidence.*" (*People v. Ghent* (1987) 43 Cal. 3d 739, 772 [parallel citations omitted]. But he may make a statement of this sort if, as here, it is "based solely on the facts of record." (*Ibid.*) There is no reasonable likelihood that the jury understood the words otherwise. Of course, "prosecutors should refrain from expressing personal views which might unduly inflame the jury against the defendant." (*Ibid.*) The views expressed by the prosecutor in this case were not such.[6]

*Rowland,* 4 Cal. 4th at 280-81.

Respondent moves for summary judgment on Claim 11 on the grounds that, as detailed above, the California Supreme Court reasonably considered and rejected petitioner's contentions on the merits, thus foreclosing relief under 28 U.S.C. 2254(d). Respondent also asserts that the state court's findings of facts are entitled to deference pursuant to 28 U.S.C. 2254(e)(1).

Although this Court disapproves of the comments by counsel (by injecting his personal views before the jury), respondent is correct on the standard. Petitioner is unable to cite to any clearly established federal law demonstrating that the state's court's conclusions were

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[6] [Opinion Footnote 19] Defendant generally claims that defense counsel provided ineffective assistance in violation of the Sixth Amendment by failing to object to the various instances of "misconduct." . . . Further, he generally claims that the court committed error apparently under California law by neglecting to prevent or cure the "harm" arising therefrom *ex proprio motu*. . . . . There *was* no impropriety.

Defendant also claims that the various instances of "misconduct" entailed the violation of both California law and the United States Constitution. Again, there was no impropriety.

unreasonable. The Supreme Court has held that when reviewing a habeas claim of prosecutorial misconduct, the relevant inquiry is not whether "the prosecutor's remarks were undesirable or even universally condemned." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (citations omitted). Rather, the issue "is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Id.* (citing *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974)).

Here, as the trial court held and the California Supreme Court confirmed, the prosecutor's statements were based on evidence in the record. Petitioner can cite to nothing indicating the statements were constitutionally improper under Supreme Court decisions, let alone that they "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden*, 477 U.S. at 181 (citing *Donnelly*, 416 U.S. at 637). Furthermore, none of the decisions cited by petitioner support his claim of prosecutorial misconduct here. In *United States v. Young*, for example, the Supreme Court found that even though certain remarks by the prosecutor were inappropriate, they did not serve to "undermine the fundamental fairness of the trial and contribute to a miscarriage of justice" and thus did not require reversal. 470 U.S. 1, 16, 19 (1985). In *Berger v. United States*, 295 U.S. 78 (1935), the Supreme Court found that certain statements made by the prosecutor constituted error because they referred to personal knowledge of the prosecuting attorney, in direct contrast to the instant case where the prosecutor's remarks were based on record evidence. As such, respondent is entitled to summary judgment on Claim 11.

**12. CLAIM 12**

In Claim 12, petitioner maintains: (1) that the prosecutor's remarks regarding the personal responsibility of the jury amounted to prosecutorial misconduct; and( 2) that his counsel's failure to object to the remarks was ineffective assistance under the Sixth Amendment. The California Supreme Court addressed both prongs of this claim in a reasoned opinion on direct appeal, as follows:

> Second, defendant complains of certain unobjected-to comments in the prosecutor's summation that allegedly misled the jury on its role in determining penalty.

> In context, the message the prosecutor delivered was this: the jurors' function was judicial, not legislative; they had to decide whether the death penalty was the appropriate punishment in this case, not whether it should be available as a sanction in general. That message, of course, was altogether sound.
>
> We do not overlook – and certainly do not approve – remarks such as this: "We had a recent election in which several of our Supreme Court justices were perceived by the voters not to be applying [the death penalty] law. They are gone now. There's no question that it is the policy expressed by the will of the populace that there be a death penalty in California, and that it be carried out in appropriate cases." Or this: "[T]he voters overwhelmingly approved the death penalty. . . ."
>
> Nevertheless, there is no reasonable likelihood that the jury understood the challenged remarks as defendant asserts – and surely not in the way as to "minimize [its] sense of responsibility for determining the appropriateness of death" in violation of the Eighth Amendment to the United States Constitution as construed in *Caldwell v. Mississippi* (1985) 472 U.S. 320, 341 [parallel citations omitted]. . . .[7]

*Rowland*, 4 Cal. 4th at 276, 281.

Petitioner has failed to demonstrate that the state court decision was contrary to, or involved an unreasonable application of, clearly established law as determined by the United States Supreme Court. *See* 28 U.S.C. 2254(d). Nor has petitioner demonstrated that the state court decision relied on an unreasonable determination of the facts. As detailed *supra*, prosecutorial remarks, even if they were "undesirable" or "universally condemned," do not rise to the level of reversible error unless they "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden*, 477 U.S. at 181 (citing *Donnelly*, 416 U.S. at 637). Petitioner argues that, under *Caldwell*, 472 U.S at 341, the prosecutor's comments alleviated the jurors of their individual responsibility for imposing a death sentence, violating the Eighth Amendment and resulting in reversible error. The California Supreme Court squarely addressed *Caldwell*, however, and found that, taken as a whole, the prosecutor's argument did not mislead the jurors regarding their discretion in sentencing petitioner.

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[7] [Opinion Footnote 19] Defendant generally claims that defense counsel provided ineffective assistance in violation of the Sixth Amendment by failing to object to the various instances of [prosecutorial] "misconduct." . . . Further, he generally claims that the court committed error by neglecting to prevent or cure the "harm" arising therefrom *ex proprio motu*. . . . There *was* no impropriety.

*Rowland*, 4 Cal. 4th at 276. Rather, taken in context, the prosecutor's argument was an "altogether sound" message to the jury that its function was to decide whether the death penalty or LWOP was the appropriate penalty in petitioner's case. *Ibid.*

Petitioner also cannot demonstrate that the state court's decision finding that there was no ineffective assistance of counsel was contrary to, or involved an unreasonable application of, clearly established federal law, or that it relied on an unreasonable determination of the facts. The decision of petitioner's counsel not to object to the prosecutor's statements was not constitutionally deficient. As this court has already concluded, the state court was not unreasonable in finding that the prosecutor's comments did not rise to the level of misconduct. Given that there was no misconduct, any objection to the comments by petitioner's trial counsel would likely have been overruled. *Strickland* and its progeny do not require that trial counsel make futile objections, and, thus, the decision of petitioner's counsel was reasonable under these circumstances. *See Sanders*, 21 F.3d at 1456.

Furthermore, petitioner cannot demonstrate that he suffered any prejudice due to his counsel's failure to object to the jury instruction. Given that any objection would have been futile, there is no reasonable probability that, had the objection been made, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 693-94. Accordingly, petitioner's claim must be denied and summary judgment granted to respondent.

**13. CLAIM 13**

In Claim 13, petitioner maintains: (1) that the prosecutor's remarks regarding the credibility of petitioner's mental health expert amounted to prosecutorial misconduct; and (2) that his counsel's failure to object to the remarks was ineffective assistance under the Sixth Amendment.

Prior orders have already found that petitioner's claim of prosecutorial misconduct is procedurally defaulted, and that petitioner is unable to demonstrate cause and prejudice sufficient to overcome the default (Docs. 163 and 252). Accordingly, respondent is entitled to summary judgment on this portion of Claim 13.

Respondent is also entitled to summary judgment on the portion of Claim 13 alleging

ineffective assistance of counsel based on the failure to object to the prosecutor's statements. To begin with, there is no merit to petitioner's claim of prosecutorial misconduct. The prosecutor's remarks did not render the trial fundamentally unfair. *Darden*, 477 U.S. at 181. As noted by the California Supreme Court, the comments in question, though "harsh and unbecoming," constituted reasonable inferences from the evidence. *Rowland*, 4 Cal. 4th at 277. As the state court reasonably found:

> For instance, Dr. Ridlehuber [petitioner's expert mental health witness] himself admitted that "psychiatry is not an exact science"; that psychiatrists rely on what they are told by their patients, who sometimes lie; that "two equally competent psychiatrists can conduct an examination on an individual and come to different conclusions"; and that psychiatrists "can be fooled, and I've been fooled." Also, as noted, there was evidence showing defendant's interest in psychology and suggesting manipulation on his part.
>
> . . .
>
> In the challenged remarks, the prosecutor did not substantially misstate facts or go beyond the record.

*Rowland*, 4 Cal. 4th at 277. Because there was no reversible misconduct on the part of the prosecutor, it was not deficient performance for petitioner's counsel to fail to object. *Strickland* and its progeny do not require that trial counsel make futile objections, and, thus, the decision of petitioner's counsel was reasonable under these circumstances. *See Sanders*, 21 F.3d at 1456; *see also*, *Miller v. Keeney*, 882 F.2d 1428, 1434 (9th Cir. 1989) (finding that a challenge to a futile objection fails both prongs of *Strickland*). Furthermore, Petitioner cannot demonstrate that he suffered any prejudice due to his counsel's failure to object to the jury instruction. Given that any objection would have been futile, there is no reasonable probability that, had the objection been made, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 693-94. Accordingly, petitioner's claim must be denied, and respondent is entitled to summary judgment on Claim 13 in its entirety.

**14. CLAIM 14**

In Claim 14, petitioner maintains: 1) that the prosecutor's remarks regarding testimony of petitioner's relatives amounted to prosecutorial misconduct; and 2) that his counsel's failure to object to the remarks was ineffective assistance under the Sixth Amendment.

As with Claim 13, previous orders have found that the prosecutorial misconduct prong of this claim is procedurally defaulted, and that petitioner is unable to demonstrate cause and prejudice sufficient to overcome the default (Docs. 163 and 252). Accordingly, respondent is entitled to summary judgment on this portion of Claim 14.

Respondent is also entitled to summary judgment on the portion of Claim 14 alleging ineffective assistance of counsel based on the failure to object to the prosecutor's statements. To begin with, there is no merit to petitioner's underlying claim of prosecutorial misconduct. In addition to dismissing this claim on procedural grounds, the California Supreme Court reasonably found that it lacked merit, as follows:

> Fifth, defendant complains of the following unobjected-to comment in the prosecutor's summation: "And his mother – I think his mother understands justice to some extent. Because when asked about anything she wanted to tell you, she really couldn't bring herself to tell you that he didn't deserve the death penalty based on the evidence that you had before you. Instead, what she said was her religion says that there shouldn't be a death penalty."
>
> The challenged remark constituted a fair comment on the evidence. There is no reasonable likelihood that the jury would have understood the works otherwise.
>
> Sixth, defendant complains of unobjected to comments in the prosecutor's summation to the effect that in determining penalty, the jury could consider evidence bearing on defendant's background but not his family's.
>
> The defendant's background is, of course, material to penalty. That is true under California law [citations omitted] and the United States Constitution (see, e.g., *Eddings v. Oklahoma* (1982) 455 U.S. 104, 110 [subsequent citations omitted]. The conclusion follows from the proposition that "the sentencer . . . [may] not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record . . . that the defendant proffers as a basis for a sentence less that death." (*Lockett v. Ohio*, *supra*, at p. 604 [additional citations omitted].)
>
> By contrast, the background of the *defendant's family* is of no consequence in and of itself. That is because under both California law . . . and the United States Constitution . . . ., the determination of punishment in a capital case turns on the defendant's personal moral culpability. It is the "*defendant's* character and record" that "the sentence . . . [may] not be precluded from considering" – not his *family's*. (*Lockett v. Ohio, supra*, 438 U.S. at p. 604 [additional citations omitted]).
>
> To be sure, the background of the defendant's family is material if, and to the extent that, it relates to the background of defendant himself. But that very point emerges from the challenged remarks. For example, the prosecutor stated: "Again, think back and decide how much of this extremely emotional and painful testimony you heard about Guy Rowland's family applies to him rather

than other people. The things that don't apply to him are not things you can consider in determining whether or not Guy Rowland is entitled to sympathy." Thus – the prosecutor declared expressly – the background of defendant's family does not matter if it does not touch his own. But – he implied – family background does count if it involves defendant himself. There is no reasonable likelihood that the jury understood the words otherwise.[8]

*Rowland*, 4 Cal. 4th at 278-80.

Petitioner cannot demonstrate that the state court's reasoned decision was contrary to, or an unreasonable application of, clearly established United States Supreme Court law, or based on an unreasonable determination of the facts. The state court addressed the controlling state and federal law and reasonably found that petitioner's claim lacked merit. A failure to object cannot be deficient performance or prejudicial under *Strickland* when there is no reasonable likelihood that the objection was meritorious. *See, e.g.* Sanders, 21 F.3d at 1456 (*Strickland* does not require that trial counsel make futile objections); *see also*, *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986) (finding that ineffective assistance of counsel claim based on defaulted Fourth Amendment claim required a showing that underlying Fourth Amendment claim was meritorious). Given that any objection here would have been futile, there is no reasonable probability that, had the objection been made, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 693-94. Accordingly, petitioner's claim must be denied, and respondent is entitled to summary judgment on Claim 14 in its entirety.

**15. CLAIM 15**

In Claim 15, petitioner maintains that certain aspects of the California death penalty statutes are unconstitutional under the Fifth, Sixth and Eighth Amendments. Specifically, he argues that the penalty phase jury instructions are deficient because they do not designate mitigating and aggravating factors, that the applicable statutes do not require proof beyond a reasonable doubt that aggravating factors have been proven and that the aggravating factors outweigh the mitigating factors, that the statutes do not require written findings as to the

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[8] [Opinion Footnote 18] Defendant claims that defense counsel provided ineffective assistance in violation of the Sixth Amendment by failing to object to the "misconduct." He also claims that the court committed error apparently under California law by neglecting to prevent or cure the harm arising therefrom *ex proprio motu*. There *was* no impropriety.

aggravating factors relied upon by the jury, and that there is no procedure utilized by the trial court regarding the jury's findings that allows meaningful review by other courts. The California Supreme Court addressed this claim in a reasoned opinion on direct appeal, as follows:

> E. *Constitutionality of the 1978 Death Penalty Law*
>
> Defendant contends that the 1978 death penalty law is facially invalid under the United States and California Constitutions, and hence that the judgment entered pursuant thereto is unsupported as a matter of law. "[A]s a general matter at least, the 1978 death penalty law is facially valid under the federal and state charters. In his argument here, defendant raises certain specific constitutional challenges. But . . . in the . . . series of cases [beginning with *People v. Rodriguez* (1986) 42 Cal. 3d at pp. 1009-1010 [parallel citations omitted], we have rejected each and every one. We see no need to rehearse or revisit our holdings or their underlying reasoning." (*People v. Ashmus, supra*, 54 Cal. 3d at pp. 1009-1010, accord, *People v. Clair, supra*, 2 Cal. 4th at p. 691.)[9]

*Rowland*, 4 Cal. 4th at 283.

Petitioner cannot show that the state court's reasoned opinion is contrary to, or an unreasonable application of, clearly established United States Supreme Court law. Petitioner also fails to demonstrate that the state court's opinion relied on an unreasonable determination of the facts. Tellingly, petitioner does not — and cannot — cite a single decision in support of his argument that the California death penalty statutes are unconstitutional under federal law. Without any citation to mandatory or persuasive authority in support of his argument, petitioner cannot demonstrate that the state court's denial of this claim was objectively unreasonable.

Indeed, the state court's reasoned decision was consonant with clearly established federal law. For example, petitioner alleges that the penalty phase jury instructions are deficient

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[9] [Opinion Footnote 22] We declare that "Whether or not expressly discussed, we have considered and rejected . . . all of the assignments of error presented in all of defendant's briefs." (*People v. Sully* (1991) 53 Cal. 3d 1195, 1252 [parallel citations omitted].)

Having reviewed the record in its entirety, we conclude that the jury found that defendant actually killed, *and* intended to kill, [Geri] within the meaning of *Enmund v. Florida, supra*, 458 U.S. 782, 788-801 [parallel citations omitted]. We also conclude that these findings are amply supported and adopt them as our own. Accordingly, we hold that imposition of penalty of death on defendant does not violate the Eighth Amendment to the United States Constitution. (See *Cabana v. Bullock* (1986) 474 U.S. 376 [parallel citations omitted].)

because they do not designate mitigating and aggravating factors. In *Tuilaepa v. California*, however, the United States Supreme Court held that giving a penalty phase jury a unitary list of sentencing factors that does not designate which factors are mitigating and which are aggravating does not violate the Constitution. 512 U.S. 967, 978-79 (1994). Moreover, our Court of Appeals has found that California's "death penalty statute's failure to label aggravating and mitigating factors is constitutional." *Williams v. Calderon*, 52 F.3d 1465, 1484 (9th Cir. 1995) (citations omitted).

Because petitioner cannot meet his burden under Section 2254(d) of showing that the state court's decision was unreasonable, respondent is entitled to summary judgment on Claim 15.

**16. CLAIM 16**

In Claim 16, petitioner maintains that his trial counsel's allegedly confusing and contradictory guilt phase closing argument amounted to ineffective assistance of counsel. This claim was raised in petitioner's second state habeas petition and was denied in a summary decision on the merits and as untimely.

An independent review of the record reveals that the state court decision with respect to this claim was not objectively unreasonable. In support of his argument that counsel's statements during closing argument amounted to ineffective assistance, petitioner cites to counsel's references to petitioner's drug use (RT 6071). Petitioner concedes that facts regarding petitioner's drug use were admitted during trial and recognizes that reference to them were part of his counsel's "apparent attempt to persuade the jury that because of the deleterious effects of using methamphetamine petitioner did not form the requisite intent to commit first degree murder." Third Amended Petition at ¶ 265. Petitioner nonetheless argues that subsequent statements by counsel undermined counsel's effort to raise a reasonable doubt regarding petitioner's culpability by stating, *inter alia*, that drugs did not forgive petitioner's conduct, which petitioner's attorney also described as "criminal" (RT at 6082-83). According to petitioner, his counsel's statements amounted to a concession of guilt and an abandonment of any viable theory of defense. Respondent counters that counsel because of the

overwhelming evidence at trial that the victim was in fact killed during her time with petitioner — was reasonably focused on lessening petitioner's culpability by arguing that a drug-induced fight occurred after consensual sex and that, during the fight, the victim was killed. According to respondent, because petitioner cannot establish that his counsel's decision was unreasonable, he cannot meet his burden under Section 2254(d).

Respondent is correct. To prevail on the merits of this claim, petitioner would need to establish that counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. *Strickland,* 466 U.S. at 686. This he cannot do. A reviewing court must be particularly deferential to counsel's tactical decisions in closing presentation because of the broad range of legitimate defense strategy at that time. *See, e.g., Yarborough v. Gentry*, 540 U.S. 1, 5-6 (2003) (*per curiam*) (counsel's exclusion of some issues in closing did not amount to professional error of constitutional magnitude where issues omitted were not so clearly more persuasive than those raised); *Davis v. Woodford*, 384 F.3d 628, 650-51 (9th Cir. 2004).

In *United States v. Fredman*, 390 F.3d 1153, 1157-58 (9th Cir. 2004), for example, our Court of Appeals concluded that counsel's decision during closing argument to concede certain facts and "admit to some crimes" was a reasonable tactic "to avoid diminishing [counsel's] credibility by arguing a lost cause." In petitioner's case, similarly, the killing itself was not realistically in dispute after the facts had been established at trial. Thus, counsel's decision to focus on lessening petitioner's culpability by arguing that while petitioner's behavior may have been criminal, he did not have the requisite intent needed for a verdict of first-degree murder, was reasonable. Because petitioner cannot demonstrate that counsel's conduct during closing argument amounted to deficient performance or resulted in prejudice, *Strickland,* 466 U.S. at 688, this claim must be denied. Summary judgment is granted to respondent.

**17. CLAIM 17**

In Claim 17, petitioner maintains that it was ineffective assistance for his trial counsel not to investigate or present expert testimony regarding petitioner's alleged voluntary intoxication via ingestion of methamphetamine. This claim was raised in petitioner's second

state habeas petition and was denied in a summary decision on the merits by the California Supreme Court.

Petitioner cannot demonstrate that the state court's rejection of this claim was objectively unreasonable under clearly established federal law; nor can he show that the denial was based on an unreasonable determination of the facts. As discussed above, the Sixth Amendment guarantees the right to effective assistance of counsel. *Strickland*, 466 U.S. at 686. To prevail on a claim of ineffective assistance of counsel, petitioner must show both that counsel's performance was deficient and that the deficient performance prejudiced petitioner's defense. *Ibid.* at 688. A court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as the result of the alleged deficiencies. *Ibid* at 697; *Williams*, 52 F.3d at 1470 & n.3 (approving district court's refusal to consider whether counsel's conduct was deficient after determining that petitioner could not establish prejudice).

Here, petitioner cannot demonstrate that, even if it was deficient performance for petitioner's counsel not to present expert evidence regarding his alleged methamphetamine use, there was any resultant prejudice under *Strickland*. Perhaps most critically, "juries are unlikely to favor defenses based on abuse of dangerous drugs in evaluating a defendant's culpability for violent behavior." *Mayfield*, 270 F.3d at 931 n.17. It is very doubtful that any juror would have found that petitioner's voluntary intoxication rendered him any less culpable at the guilt phase, and petitioner cannot cite to any evidence or caselaw to the contrary.

It is similarly unlikely that any juror would have found petitioner's voluntary intoxication to be a mitigating factor supporting a sentence of LWOP instead of death. Petitioner does not demonstrate how such evidence would have been mitigating during the penalty phase; additionally, the Supreme Court and other courts have repeatedly found that the egregious nature of a defendant's offenses may overcome any alleged prejudice resulting from counsel's failure to introduce mitigating evidence. *See, e.g. Strickland*. 466 U.S. at 700; *Gerlaugh v. Stewart*, 129 F.3d 1027, 1033, 1042 (9th Cir. 1997). Here, in addition to the violent circumstances of the crimes of conviction, the prosecution offered in aggravation evidence of

other violent crimes perpetrated by petitioner and his prior felony convictions. *Rowland*, 4 Cal. 4th at 353. Given the significant aggravating circumstances, petitioner cannot reasonably argue that introduction of evidence regarding his voluntary intoxication would have led to a different result at the penalty phase. Because he cannot establish prejudice as a result of his counsel's alleged deficient performance, petitioner's ineffective assistance claim must fail and summary judgment is granted to respondent.

**18. CLAIM 18**

In Claim 18, petitioner alleges that it was ineffective assistance for his counsel not to introduce the entirety of petitioner's confession to Susan Lanet during the guilt phase of his trial. This claim was raised in petitioner's second state habeas petition and denied as untimely and on the merits in a summary opinion by the California Supreme Court.

Lanet was a key prosecution witness who testified during the guilt phase regarding petitioner's confession to her that he killed the victim. The trial court held that Lanet was not permitted to disclose any facts during her testimony relating to petitioner's prior convictions. After a motion by petitioner's counsel, however, the trial court also held that admission of Lanet's statements that petitioner had never mentioned any sexual motive for the fight — but rather had told Lanet he killed Geri during a fight over drugs fueled by Geri's derogatory statements to petitioner about ex-convicts — would open the door to admission of proof of petitioner's prior convictions for rape and other crimes (RT 5847-51). As a result, petitioner's counsel opted not to question Lanet regarding petitioner's statements to her that he killed the victim after a fight relating to drugs. According to petitioner, his trial counsel ought to have questioned Lanet regarding the statements petitioner made about the reason for the killing, because it would have assisted in his defense argument that he did not have the requisite intent to kill for first degree murder and that he did not commit rape. Petitioner argues this evidence was so important to his defense that his counsel should have elicited it even though it would have meant admission of petitioner's prior convictions. According to petitioner, the state court was unreasonable when it decided otherwise.

Petitioner is incorrect. To prevail on a claim of ineffective assistance of counsel,

petitioner must show both that counsel's performance was deficient and that the deficient performance prejudiced petitioner's defense. *Strickland*, 466 U.S. at 688. Given the egregious and prejudicial nature of petitioner's prior convictions (including oral copulation, sodomy, and lewd acts on a child), it was reasonable for his counsel to conclude that it was preferable to keep evidence of his prior convictions out of the record, even if it meant foregoing testimony by Lanet that the killing occured in a fight over drugs. This is particularly true given that testimony in question was a self-serving statement by petitioner that was supported by no other evidence. *See, e.g., Brodit*, 350 F.3d at 994 (holding that state court reasonably concluded that trial attorney provided effective assistance of counsel where attorney declined to present evidence favorable to defense out of concern that it would open door to unfavorable evidence). Because petitioner cannot demonstrate either that his counsel's conduct regarding Lanet's testimony amounted to deficient performance or that it resulted in prejudice, *Strickland*, 466 U.S. at 688, this claim must be denied and summary judgment granted to respondent.

**19. CLAIM 19**

In Claim 19, petitioner alleges that the jurors received extrajudicial information about LWOP and erroneously based their sentence of death on that information. Specifically, petitioner alleges that the jurors received information that even if petitioner was sentenced to LWOP, he could still be released from prison via, for example, commutation or pardon. This claim is closely related to Claim 3, *supra*, except that this claim includes the allegation that a juror received the information from an outside source and then repeated it during deliberations. This claim was raised in petitioner's first state habeas petition and denied on the merits in a summary opinion by the California Supreme Court.

An independent review of the record reveals that the California Supreme Court's summary decision denying relief on this claim was not objectively unreasonable. As our Court of Appeal has stated, we must "focus primarily on Supreme Court cases in deciding whether the state court's resolution of the case constituted an unreasonable application of clearly established federal law." *Greene*, 288 F.3d at 1089 (citations omitted). Petitioner cannot cite to any United States Supreme Court authority suggesting that a jury's brief discussion of views regarding the

impact of various sentences is reversible error, and "[a] state court cannot possibly have contravened, or even unreasonably applied, 'clearly established Federal law, as determined by the Supreme Court of the United States,' by rejecting a type of claim that the Supreme Court has not once accepted as valid." *In re Davis*, 130 S.Ct. 1, 3 (2009).

Here, petitioner supports his claim by citing to several juror declarations, declarations that were also submitted to the California Supreme Court. As a threshold matter, petitioner has not established that the information contained in the declarations is even admissible. There is a "weighty government interest in insulating the jury's deliberative process," *Tanner v. United States*, 483 U.S. 107, 120 (1987), and thus Fed. R. Evid. 606(b)(1) limits the admission of testimony from a juror regarding "any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental process concerning the verdict or indictment." Furthermore, a court reviewing the validity of a verdict "may not receive a juror's affidavit or evidence of a juror's statement on these matters." *Ibid.*

A juror may testify if, *inter alia*, "extraneous prejudicial information was improperly brought to the jury's attention," Fed. R. Evid. 606(b)(2), but this petitioner cannot establish. To begin with, as respondent points out and as petitioner concedes, the jury declarations contain no allegations of outside information actually being presented to the jury; instead, they include individual jurors' opinions on the matter and allegations that the impact of an LWOP sentence was discussed.

More importantly, petitioner cannot establish that information regarding whether a defendant sentenced to LWOP might nonetheless be released under certain circumstances is prejudicial. A petitioner is entitled to habeas relief only if it can be established that the exposure to extrinsic evidence had "'substantial and injurious effect or influence in determining the jury's verdict.'" *Sassounian v. Roe*, 230 F.3d 1097, 1108 (9th Cir. 2000) (quoting *Brecht*, 507 U.S. at 623); *see Jeffries v. Blodgett*, 5 F.3d 1180, 1190 (9th Cir. 1993) (same). In other words, the error must result in "actual prejudice." *See Brecht*, 507 U.S. at 637. As discussed in detail *supra* in Claim 3, the Supreme Court has held that it is not prejudicial for a jury to be

specifically instructed that it is allowed to consider gubernatorial commutation powers of an LWOP sentence. *Ramos*, 463 U.S. at 1012-13. As such, petitioner cannot — due to the absence of clearly established federal law to the contrary — demonstrate that the jury's receipt of information or speculation regarding such a possibility is prejudicial. Accordingly, summary judgment is granted to respondent on this claim.

**20. CLAIM 20**

In Claim 20, petitioner alleges that juror misconduct occurred because at least one alternate juror communicated with sitting jurors and discussed their deliberations. According to petitioner, this alleged communication undermines the reliability of both the guilt phase and the penalty phase verdicts. This claim was raised in petitioner's first state habeas petition and denied on the merits in a summary opinion by the California Supreme Court. With additional factual allegations, this claim was also raised in petitioner's second state habeas petition and denied by the California Supreme Court.

An independent review of the record reveals that the California Supreme Court's summary decision denying relief on this claim was not objectively unreasonable. Petitioner maintains, based on declarations from various jurors, that an alternate spoke with the sitting jurors and asked them questions about the status of deliberations. Petitioner also alleges that this same alternate juror passed information he received from the sitting jurors on to petitioner's family members.

Petitioner's allegations do not amount to a credible claim of prejudicial error. The Supreme Court has held that the Constitution "does not require a new trial every time a juror has been placed in a potentially compromising situation." *Smith v. Phillips*, 455 U.S. 209, 217 (1982). The safeguards of juror impartiality, such as voir dire and protective instructions from the trial judge, are not infallible; it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. *Ibid.; see also, Rushen v. Spain*, 464 U.S. 114, 118 (1983).

To begin with, petitioner cannot demonstrate that the alternate juror's alleged discussions with the sitting jurors — while perhaps inappropriate — were in any way

prejudicial to him. Petitioner can cite to no clearly established federal law holding that this type of contact is prejudicial. This is not a case where the sitting jurors were being provided with extrinsic information — and even if it were, extrinsic information may only be a basis for habeas relief if it had a "substantial and injurious effect or influence in determining the jury's verdict." *Sassounian*, 230 F.3d at 1108 (citations omitted). While there is no Supreme Court authority directly on point, the Supreme Court has found that it was not inherently prejudicial for an alternate juror to remain with the sitting jurors during deliberations. *United States v. Olano*, 507 U.S. 725 (1993). The decisions to which petitioner has cited are distinguishable from the facts here. For example, in *Remmer v. United States*, 347 U.S. 227 (1954), the juror had allegedly been offered a bribe by an outside source — not been asked questions by an alternate juror — and an FBI investigation had resulted. And in *Parker v. Gladden*, 385 U.S. 363 (1966), jurors had heard from the bailiff that the defendant was wicked and guilty.

In addition, petitioner cannot demonstrate that the alternate juror's discussions with petitioner's family members were prejudicial to him. The alternate juror did not sit on the jury that rendered the verdict, and there is nothing in the juror declarations that indicates that the alternate juror was relaying information to the sitting jurors from petitioner's family or that the sitting jurors were aware that the alternate juror was talking to petitioner's family. Petitioner can cite to no clearly established federal law holding that such a situation is inherently prejudicial, and in the absence of prejudice, he is not entitled to habeas relief. *Sassounian*, 230 F.3d at 1108; *Brecht*, 507 U.S. at 623. Because petitioner cannot demonstrate that the state court's decision is unreasonable under Section 2254(d), this claim must be denied and summary judgment granted to respondent.

**21. CLAIM 21**

In Claim 21, petitioner alleges that the jurors improperly considered the fact that petitioner did not testify at trial. This claim was raised in petitioner's second state habeas petition and denied in a summary opinion by the California Supreme Court.

This claim is without merit. To begin with, as with Claim 19, *supra*, petitioner's sole support for this claim is juror declarations, and petitioner has failed to show that the information

included in these declarations is even admissible under Fed. R. Evid. 606(b)(2). Indeed, our Court of Appeals has held that testimony from jurors that they "ignored the court's instructions and discussed a defendant's failure to testify during deliberations . . . is inadmissible under Rule 606(b) because . . . it does not concern facts bearing on extraneous or outside influences on the deliberations." *United States v. Rutherford*, 371 F.3d 634, 640 (9th Cir. 2004). Accordingly, petitioner cannot demonstrate that the state court's decision denying this claim was unreasonable, and summary judgment must be granted to respondent.

**22. CLAIM 22**

In Claim 22, petitioner maintains that a member of the trial court staff gave information to a juror that petitioner's family was being searched for weapons before they were allowed to enter the courtroom. Petitioner maintains that these remarks were prejudicial and violated his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. This claim was raised in petitioner's second state habeas petition and denied in a summary opinion by the California Supreme Court.

An independent review of the record reveals that the state court's summary dismissal of this claim was not objectively unreasonable. *See Delgado*, 233 F.3d at 982. To begin with, the only declaration petitioner has submitted in support of this claim to the California Supreme Court and to this court — is unsigned. Under California law, something more than an unsworn statement is required to make a *prima facie* claim for relief, *People v. Madaris*, 122 Cal. App. 3d 234, 241-42 (1981), and petitioner cannot support his claim for habeas relief based on an unsigned, unsworn declaration relaying a hearsay statement. Moreover, the declaration gives no context as to how, when or where the juror allegedly heard the information that petitioner's family was being searched for weapons, or whether she passed the information on to other jurors (Exh. G to Petitioner's Opp. To Motion For Summary Judgment).

Even if petitioner had submitted a signed declaration, he would be unable to demonstrate that the state court's decision denying this claim was unreasonable. As discussed *supra*, extrinsic evidence relayed to jurors may only be a basis for habeas relief if it had a "'substantial and injurious effect or influence in determining the jury's verdict.'" *Sassounian*,

230 F. 3d at 1108 (quoting *Brecht*, 507 U.S. at 623). In order to establish relief on a particular claim, petitioner must show that the state court's adjudication of his claim was not merely wrong but unreasonable "beyond any possibility for fair-minded disagreement," *Richter* 131 S. Ct. at 786; the information in the unsigned declaration falls well below this threshold.

Petitioner argues that if he is granted an evidentiary hearing he may be able to establish additional facts demonstrating prejudice and entitling him to relief on this claim. Under AEDPA, this is not permissible, as a federal court may not generally consider evidence beyond the state court record in determining whether there was a reasonable basis for the state court decision. *Pinholster*, 131 S. Ct. at 1398, 1400 n.7; 28 U.S.C. 2254(d). Accordingly, this claim is denied and summary judgment is granted to respondent.

**23. CLAIM 23**

In Claim 23, petitioner maintains that he is factually innocent and that he is entitled to habeas relief on this ground. This claim was raised in petitioner's second state habeas petition and denied in a summary opinion by the California Supreme Court.

Petitioner cannot demonstrate that the state court's denial of this claim was unreasonable pursuant to Section 2254(d). Perhaps most importantly, the Supreme Court has never held that a freestanding claim of actual innocence may serve as a basis for a grant of habeas relief, even in capital cases. *Herrera v. Collins*, 506 U.S. 390, 400 (1993). Rather, "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." *Id.* More recently, the Supreme Court has reconfirmed that an actual innocence claim has never been held to be a basis for habeas relief, stating:

> This Court has *never* held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is "actually" innocent. Quite to the contrary, we have repeatedly left that question unresolved, while expressing considerable doubt that any claim based on alleged "actual innocence" is constitutionally cognizable. [Citations omitted]. A state court cannot possibly have contravened, or even unreasonably applied, "clearly established Federal law, as determined by the Supreme Court of the United States," by rejecting a type of claim that the Supreme Court has not once accepted valid.

*Davis*, 130 S.Ct. at 2-3.

In addition, even if the Supreme Court had established that freestanding claims of actual innocence are cognizable on federal habeas, petitioner has not made any compelling allegations, or cited to any meaningful evidence, in support of such a claim. For example, petitioner alleges that he is factually innocent of rape. As the discussion of Claim 9 confirms, however, there was more than sufficient evidence in the record for a rational trier of fact to conclude both that Geri was alive at the time of intercourse and that she did not consent. *Rowland*, 4 Cal. 4th at 270. Summary judgment on this claim must be granted to respondent.

**24. CLAIM 24**

In Claim 24, petitioner maintains that the California death penalty statutes are unconstitutional in both formulation and application. Specifically, he argues that California's death penalty statute is overbroad in that it allows, according to petitioner, virtually any first-degree murder case to be charged as a death penalty case, in violation of the Eighth Amendment. This claim was raised in petitioner's second state habeas petition and denied in a summary opinion by the California Supreme Court.

Petitioner cannot demonstrate that the state court decision regarding this claim was unreasonable under clearly established federal law. Petitioner maintains that the California death penalty scheme fails to adequately narrow the class of first degree murderers eligible for the death penalty. The applicable United States Supreme Court law, however, holds that in order to pass constitutional muster, a state's death penalty scheme "may not apply to every defendant convicted of murder; it must apply only to a subclass of defendants convicted of murder." *Tuilaepa*, 512 U.S. at 972. In *Tuilaepa*, the Supreme Court held that California's death penalty scheme does appropriately narrow the class of death-eligible defendants and does not apply to every defendant convicted of murder. Accordingly, this claim must be denied and summary judgment granted to respondent.

**25. CLAIM 25**

In Claim 25, petitioner maintains that he was denied meaningful review of his claims on direct appeal and state habeas corpus proceedings by the California Supreme Court. This claim was raised in petitioner's second state habeas petition and denied in a summary opinion by the

California Supreme Court.

Petitioner is unable to demonstrate that the state court's decision is objectively unreasonable. *Delgado,* 223 F.3d at 982. An independent review of the record reveals that petitioner's claim has no merit.

As a threshold matter, petitioner has not demonstrated that these claims are cognizable on federal habeas review. First, to the extent that petitioner is challenging the state court's habeas review of his claims, petitioner cannot demonstrate that there is any federal constitutional right to state habeas proceedings. As a result, a claim "alleging errors in the state post-conviction review process is not addressable through habeas corpus proceedings." *Franzen v. Brinkman*, 877 F.2d 26, 26 (9th Cir. 1989). Thus, petitioner's claim that the habeas review of his case was unfair must be denied.

To the extent that petitioner is maintaining that he received an unfair direct appellate review of his case, that claim is also without merit. Petitioner can cite to no clearly established Supreme Court law that requires a specific type of appellate review. In addition, there is nothing in the California Supreme Court's lengthy and exhaustive opinion on direct review indicating that it did not meaningfully consider petitioner's claims. *Rowland*, 4 Cal. 4th at 250-283. Finally, our Court of Appeals has confirmed that the California death penalty statute "ensures meaningful appellate review." *Williams,* 52 F.3d at 1484.

In sum, because petitioner cannot demonstrate the state court's denial of this claim was objectively unreasonable, this claim must be denied and summary judgment granted to respondent.

**26. CLAIM 26**

In Claim 26, petitioner alleges that he was denied ineffective assistance of appellate counsel. This claim was raised in petitioner's second state habeas petition and denied as untimely and on the merits by the California Supreme Court.

The Due Process Clause of the Fourteenth Amendment guarantees a criminal defendant

the effective assistance of counsel on his first appeal as of right.[10] *Evitts v. Lucey*, 469 U.S. 387, 391-405 (1985). Claims of ineffective assistance of appellate counsel are reviewed according to the standard set out in *Strickland*, 466 U.S. at 668. *Smith v. Robbins*, 528 U.S. 259, 285 (2000); *Moormann v. Ryan*, 628 F.3d 1102, 1106 (9th Cir. 2010). First, the petitioner must show that counsel's performance was objectively unreasonable, which in the appellate context requires the petitioner to demonstrate that counsel acted unreasonably in failing to discover and brief a merit-worthy issue. *Smith*, 528 U.S. at 285; *Moormann*, 628 F.3d at 1106. Second, the petitioner must show prejudice, which in this context means that the petitioner must demonstrate a reasonable probability that, but for appellate counsel's failure to raise the issue, the petitioner would have prevailed in his appeal. *Smith*, 528 U.S. at 285-286; *Moormann*, 628 F.3d at 1106.

Appellate counsel does not have a constitutional duty to raise every nonfrivolous issue requested by defendant. *See Jones v. Barnes*, 463 U.S. 745, 751-54 (1983); *Gerlaugh*, 129 F.3d at 1045; *Miller*, 882 F.2d at 1434 n.10. The weeding out of weaker issues is widely recognized as one of the hallmarks of effective appellate advocacy. *See ibid.* at 1434. Appellate counsel therefore will frequently remain above an objective standard of competence and have caused his client no prejudice for the same reason because he declined to raise a weak issue. *Ibid.*

To prevail on this claim, petitioner must show that there was no reasonable basis for the state court's summary denial of this claim. *Richter*, 131 S.Ct at 786. This petitioner cannot do. Indeed, petitioner does not even attempt to do so. Rather, he primarily maintains, both in his petition and in his opposition to respondent's motion for summary judgment, that he will present additional facts after discovery and an evidentiary hearing on this claim. Under AEDPA, this is not permissible, as a federal court may not generally consider evidence beyond the state court record in determining whether there was a reasonable basis for the state court decision. *Pinholster*, 131 S. Ct. at 1398, 1400 n.7; 28 U.S.C. 2254(d).

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[10] To the extent petitioner is alleging deficiencies by his counsel during state habeas proceedings, his claim must fail. The Supreme Court has confirmed that there is no constitutional right to effective assistance of counsel beyond trial and first appeal as of right. *See Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987).

Furthermore, a review of the record confirms that petitioner's appellate counsel did not fail to discover and brief a merit-worthy issue; nor is there any indication that had any additional issue been raised, petitioner would have prevailed in his appeal. *Smith*, 528 U.S. at 285-286. Accordingly, respondent is entitled to summary judgment on this claim.

**27. CLAIM 27**

In Claim 27, petitioner maintains that a death sentence carried out via lethal gas or lethal injection constitutes cruel and unusual punishment under international law, specifically the International Covenant of Civil and Political Rights. This claim was raised in petitioner's second state habeas petition and was denied by the California Supreme Court.

This claim is meritless and borders on frivolous. To begin with, petitioner cannot demonstrate that any claim of a violation of international law is even cognizable on federal habeas review, given that such review is designed to address claims that a petitioner is in custody in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. 2254(a). International law is not United States law, and petitioner does not demonstrate that the International Covenant of Civil and Political Rights creates a form of relief enforceable in United States courts.

In addition, because there is no clearly established federal law holding that the California death penalty violates international law, and that this alleged violation creates a cognizable claim on federal habeas review, petitioner's claim must also fail on the merits. Without citation to any mandatory or persuasive authority in support of his argument, petitioner cannot demonstrate that the state court's denial of this claim was objectively unreasonable. This claim is therefore denied, and respondent is entitled to summary judgment on this claim.

**28. CLAIM 28**

In Claim 28, petitioner maintains the prosecutor's alleged eliciting of testimony regarding petitioner's future dangerousness from a penalty phase witness violated the Eighth Amendment and petitioner's rights to due process. The California Supreme Court addressed this claim in a reasoned opinion on direct appeal, as follows:

> Defendant first complains of the prosecutor's unobjected-to cross-examination of defense witness James W.L. Park, a correctional consultant.
>
> On direct examination, defense counsel elicited brief testimony from Park on the conditions of confinement for a person sentenced to life imprisonment without possibility of parole. He did so in an evident attempt to show substantial restrictions on freedom and minimal opportunities for violence.
>
> On cross-examination, the prosecutor elicited testimony from Park that was briefer still on the same matter, including such specific topics as the availability of privileges, access to illicit drugs and alcohol, and the presence of women among prison staff. He did so in an evident attempt to make a showing contrary to defense counsel's, indicating the liberties that might be enjoyed and the occasions that might arise for inflicting physical harm, sexual and otherwise.
>
> A prosecutor, of course, may seek to disprove on cross-examination what defense counsel sought to prove on direct examination. (*People v. Gordon, supra*, 50 Cal. 3d at p. 1270.) The prosecutor here did that – and substantially nothing more. Defendant asserts that the inquiry on cross-examination went beyond that on direct examination, improperly touching on future dangerousness. The assertion, however, is not supported by the record.[11]

*Rowland*, 4 Cal. 4th at 275.

Respondent moves for summary judgment on Claim 28 on the grounds that, as detailed above, the California Supreme Court reasonably considered and rejected petitioner's contentions on the merits, thus foreclosing relief under 28 U.S.C. 2254(d). He also asserts that the state court's findings of facts are entitled to deference pursuant to 28 U.S.C. 2254.

Respondent is correct. Petitioner is unable to cite to any clearly established federal law

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[11] [Opinion Footnote 16] Defendant claims that the evidence elicited on cross-examination was inadmissible under both California law and the United States Constitution. We reject the point. "It is of course, the general rule that questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal.'" (*People v. Benson, supra*, 52 Cal. 3d at p. 786, fn 7) [additional citations omitted].) At trial, defense counsel failed to make any objection whatsoever. Contrary to what defendant appears to argue, the omission did not constitute ineffective assistance in violation of the Sixth Amendment. Counsel's performance was not deficient; it was not "objectively unreasonable . . . to remain silent and thereby call no attention to the prosecutor's [questioning]" [citation omitted] especially when, as here questioning was relatively brief.

Defendant also claims that the prosecutor engaged in misconduct by referring in his summation to the evidence elicited on cross-examination. There was no objection. In any event, there was no impropriety. The challenged comments comprised an unproblematic argument to the effect that life imprisonment without possibility of parole was not the appropriate punishment in this case. There is no reasonable likelihood that the jury understood the words otherwise. (*People v. Clair, supra*, 1 Cal. 4th at pp. 662-663 [stating the "reasonable likelihood" standard as the test for determining whether the jury misconstrued or misapplied comments by a prosecutor].)

demonstrating that the state's court's conclusions were unreasonable. In fact, petitioner cites to no decisions at all in support of his argument regarding this claim, arguing instead that summary judgment should be denied and an evidentiary hearing held on this claim. Given that, in order to establish relief on a particular claim, petitioner must show that the state court's reasoned adjudication of his claim was not merely wrong but unreasonable "beyond any possibility for fair-minded disagreement," *Richter* 131 S. Ct. at 786, petitioner's conclusory argument is insufficient. This claim is denied and summary judgment is granted to respondent.

## CONCLUSION

For the foregoing reasons, respondent's motion for summary judgment is **GRANTED** as to all claims. Petitioner's motion for an evidentiary hearing is **DENIED** as to all claims. The petition for a writ of habeas corpus is **DENIED** as to all claims.

Rule 11(a) of the Rules Governing Section 2254 Cases now requires a district court to rule on whether a petitioner is entitled to a certificate of appealability in the same order in which the petition is denied. Petitioner has failed to make a substantial showing that his claims amounted to a denial of his constitutional rights or demonstrate that a reasonable jurist would find the denial of his claims debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Consequently, no certificate of appealability is warranted in this case.

**IT IS SO ORDERED.**

Dated: October 2, 2012.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

West Reporter Image (PDF)

4 Cal.4th 238, 841 P.2d 897, 14 Cal.Rptr.2d 377

Briefs and Other Related Documents
Judges, Attorneys and Experts

Supreme Court of California,
In Bank.
The PEOPLE, Plaintiff and Respondent,
v.
**Guy** Kevin **ROWLAND**, Defendant and Appellant.

No. S006395.
Dec. 17, 1992.
Rehearing Denied Feb. 10, 1993.

Defendant was convicted in the Superior Court, San Mateo County, No. C-16709, Dale A. Hahn, J., of rape and murder under the special circumstance of felony-murder in the course of rape, and sentence of death was imposed. On automatic appeal from judgment of death, the Supreme Court, Mosk, J., held that: (1) defendant's proposed cross-examination of prosecution witness would "open the door" to introduction of challenged other crimes' evidence; (2) evidence of defendant's prior convictions was relevant to broad issue of intent; (3) victim's statement to her friend, prior to incident, was admissible under "state of mind" hearsay exception; (4) *Kelley-Frye* test for admissibility of scientific evidence did not apply to expert testimony on genital trauma; (5) defendant was not entitled to impanelment of separate juries to try guilt/death eligibility and penalty; and (6) defendant's conviction for rape was supported by evidence.

Affirmed.

West Headnotes

[1] KeyCite Citing References for this Headnote

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1036 Evidence
110k1036.2 k. Competency, examination, and impeachment of witnesses. Most Cited Cases

Denial of motion to exclude prior conviction offered for impeachment is not reviewable on appeal if defendant fails to testify. West's Ann.Cal. Const. Art. 1, § 28(f); West's Ann.Cal.Evid.Code § 352.

[2] KeyCite Citing References for this Headnote

410 Witnesses
410IV Credibility and Impeachment
410IV(B) Character and Conduct of Witness
410k359 k. Evidence of accusation or conviction of crime. Most Cited Cases

Defendant was not entitled to exclusion of impeachment evidence of defendant's prior felony convictions for sodomy, lewd conduct, and oral copulation where defendant did not testify; it was impossible to know precise nature of defendant's "testimony," any harm arising from denial of

350H Sentencing and Punishment
350HVIII The Death Penalty
350HVIII(A) In General
350Hk1622 Validity of Statute or Regulatory Provision
350Hk1624 k. Provision authorizing death penalty. Most Cited Cases
(Formerly 110k1206.1(2))

State death penalty law is facially valid under both Federal and State Constitutions. U.S.C.A. Const.Amends. 8, 14.

***384 *249 **904** Andrew J. Wellll, Benjamin, Wellll, Mazer, San Francisco, under appointment by the Supreme Court, and Robert Navarro, for defendant and appellant.

Daniel E. Lungren, Atty. Gen., George Williamson, Chief Asst. Atty. Gen., John H. Sugiyama, Asst. Atty. Gen., Dane R. Gillette, Morris Beatus and Christopher W. Grove, Deputy Attys. Gen., for plaintiff and respondent.

***250** MOSK, Justice.

This is an automatic appeal (Pen.Code, § 1239, subd. (b)) from a judgment of death under the 1978 death penalty law ( *id.*, § 190 et seq.).

On February 11, 1987, the District Attorney of San Mateo County filed an amended information against defendant Guy Kevin Rowland in the superior court of that county. (He had filed the original information on September 29, 1986.)

Count I charged that on or about March 17, 1986, defendant murdered Marion R. (Pen.Code, § 187.)

It was alleged for death eligibility that defendant committed the offense under the special circumstance of felony murder in the course of rape (Pen.Code, § 261). ( *Id.*, § 190.2, subd. (a)(17)(iii).)

Count II charged that on or about March 17, 1986, defendant raped Marion R. (Pen.Code, § 261, subd. (2), as amended by Stats.1985, ch. 283, § 1, pp. 1307-1308, present Pen.Code, § 261, subd. (a)(2).)

It was alleged for enhancement of sentence that on or about June 8, 1981, defendant was convicted in the Superior Court of Alameda County of twelve "serious felonies" (Pen.Code, § 667, subd. (a)): two counts of kidnapping ( *id.*, § 207); three counts of rape ( *id.*, § 261); three counts of rape in concert ( *id.*, §§ 261, 264.1); two counts of sodomy ( *id.*, § 286); one count of lewd or lascivious conduct with a child under fourteen years of age ( *id.*, § 288, subd. (a)); and one count of oral copulation ( *id.*, § 288a).

It was also alleged for enhancement of sentence that defendant served a prison term for each of the 12 offenses listed above. (Pen.Code, § 667.5, subd. (b).)

It was finally alleged for purposes of prohibiting probation or suspension of sentence that defendant committed the charged murder and rape while on state prison parole (Pen.Code, § 3000) following a prison term imposed for the "violent felonies" comprising each of the 12 offenses listed above, with the exception of the 2 kidnapping counts. ( *Id.*, § 1203.085, subd. (a).)

Defendant pleaded not guilty to the charges and denied the allegations.

Trial was by jury as to the charges and the special circumstance allegation. With defendant's agreement to bifurcation and waiver of a jury, trial was by ***251** the court as to the other allegations. The jury returned verdicts of guilty against defendant as to murder in the first degree and rape, and also found the special circumstance allegation true. It subsequently returned a verdict of death for the

murder. The court rendered a finding of true as to each of the other allegations. It denied the automatic application for modification of the verdict of death. (Pen.Code, § 190.4, subd. (e).) It proceeded to enter judgment as ***385 follows. **905 For the murder, it imposed the sentence of death. For the rape, it imposed a sentence of imprisonment comprising the upper term of eight years as to the offense itself, to be served fully, separately, and consecutively to any other sentence, with an additional term of five years for the prior "serious felony" convictions. It stayed the sentence of imprisonment pending execution of the sentence of death.

Finding no reversible error or other defect, we conclude that the judgment must be affirmed.

## I. FACTS

### A. *Guilt Phase*

The evidence presented by the People told a tale to the following effect.

About 9 p.m. on March 16, 1986, defendant was introduced to Marion R. at the Wild Idle Bar in the rural community of Byron in Contra Costa County. He was 24 years of age and she was 31. Marion R. was talking with friends "about chickens and eggs and all kinds of things, town things." She was still feeling the effects of a cold she had the previous week and was drinking only moderately. She lived and worked in Byron, residing with her mother and serving as a cook at the Boys' Ranch. She was not known as a "loose woman." All the same, she regularly "snorted" methamphetamine and evidently had a vial of the substance in her possession. Defendant was a stranger from Livermore in neighboring Alameda County. At the bar, he had asked a patron, "[W]here's the chicks in town here [?]" He was told "if he wanted chicks he should go to Walnut Creek or Concord if he's looking for that kind of action."

Defendant socialized with Marion R. for a while. To the eyes of an off-duty bartender, he appeared to be "coming on" to her. She did not respond positively, but seemed to be "trying to ignore" him.

Before 10 p.m., defendant left the bar alone. Apparently, he drove away in a truck he had driven there.

Sometime later, Marion R. told a friend named Jeanne Weems that "she was not feeling very well, she had a terrible headache," and that "she had to *252 go to work early the next morning and she needed to go home because she had a terrible headache and she needed to get some sleep." (Generally, she set out for work around 5:30 a.m. and went to bed by 11 p.m.) She then left the bar alone. Apparently, she drove away in a car she had driven there. Not long afterwards, the vehicle was seen parked about half a block from the bar in an unusual location and in an unusual way; it was evidently empty; and it was apparently unlocked—a condition inconsistent with Marion R.'s "firmly ingrained" "habit."

In the hours that followed, defendant brutally beat Marion R. about the head and face and elsewhere. He also had sexual intercourse with her, evidently against her will. There was expert testimony that she suffered a bruise "an inch or two above the [right] kneecap and somewhat towards the inside part of the thigh"; the location of the injury was "unusual"; such a bruise, however, could have been caused "if someone used a knee ... to force the legs apart." Finally, he strangled her. Apparently, he choked her twice: the first time, he did not succeed in killing her; the second time, about 30 to 60 minutes later, he did. Before death, she ingested a potentially lethal dose of methamphetamine. It appears that he may have put the substance into her mouth after he overcame her resistance. It does not appear that she could have "snorted" the requisite quantity of the substance or that she would have attempted to do so voluntarily. He hauled the body in his truck to the vicinity of Half Moon Bay in San Mateo County, dragged it on the ground, and dumped it in the ocean.

About 6 a.m. on March 17, defendant called a woman named Susan Lanet, who lived in Livermore and was apparently his lover, and arranged to visit. Around 7 a.m. he arrived at her house. He seemed disturbed and said he was going to leave the state. They shared some methamphetamine he had evidently taken from Marion R. Later, he again said he was going to leave the state. He soon admitted that he ***386 **906 had killed Marion R. He asked Lanet whether she wanted some of

the dead woman's belongings, including a ring and makeup. She said no. He offered her $20 to clean his truck and remove " [b]lood and every strand of hair." Frightened, she purported to accept. Her secret intent, however, was to summon the police. She eventually did so. About 9 a.m., an officer of the Livermore Police Department arrested defendant as he attempted to flee. It was later determined that defendant had not consumed a quantity of methamphetamine that would have caused substantial impairment at any time relevant here. Around 9:45 a.m., Marion R.'s body was found lying face down at the base of a cliff in the environs of Moss Beach near Half Moon Bay.

Defendant did not present any evidence. He did not himself take the stand, nor did he call any witnesses.

***253** B. *Penalty Phase*

To establish the appropriateness of the death penalty, the People offered in aggravation: (1) the circumstances of the offenses defendant committed against Marion R.; (2) other violent criminal activity he perpetrated; and (3) prior felony convictions he suffered.

As to the circumstances of the offenses, the People did not present any evidence. Instead, they relied on the evidence already adduced at the guilt phase.

As to other violent criminal activity, the People presented evidence to the following effect.

On April 4, 1978, defendant unlawfully entered the residence of Harriet Larson in San Ramon in Contra Costa County. Attempting to escape, he assaulted and battered the woman, who was then 63 years of age. She suffered a crushed vertebra and required 11 days of hospitalization.

On October 4, 1980, defendant lured 26-year-old Tereza V. out of a bar in Pleasanton in Alameda County to a nearby park with a false offer to share some cocaine. At the park, he made sexual advances; she rejected his approach; he then assaulted, battered, and raped her; during the attack, she bit off part of his tongue.

On November 7, 1980, together with a male partner, defendant lured Lisa V. and Caren F. into a truck in Fremont in Alameda County with a false offer of a ride; the girls were friends and were then 13 years of age. Defendant and his partner then kidnapped Lisa and Caren. Caren escaped; Lisa attempted to, but failed. Defendant helped his partner rape Lisa twice. He himself raped her six times, caused her to orally copulate him, sodomized her twice, and fondled her genital organs and other parts of her body. During the attack, he repeatedly threatened her with death if she resisted.

On March 11, 1986, defendant engaged in an acrimonious argument with his apparently 20-year-old stepsister Kell Taylor in the home she shared with her mother and stepfather (defendant's father) in Pleasanton. The occasion was a dispute about the locking of a door. The cause, however, was evidently something else: defendant had formerly expressed a romantic interest; Taylor did not respond in a positive fashion, but rather (it seems) with antagonism. In the course of the argument, during which he took up a knife and slammed his fist through the door of Taylor's bedroom, defendant assaulted Taylor and threatened her with death.

***254** On March 11, 1986, defendant was introduced to Patricia G. by Susan Lanet at Lanet's home in Livermore. The trio used some methamphetamine. Later, defendant offered to drive Patricia home and she accepted. Lanet did not go along. Defendant did not take Patricia home. Instead, he drove her to the top of a cliff that loomed over a body of water. During the trip, he had started to beat her. At the cliff, he pulled her out of the car, hit her repeatedly, and pushed her to the ground; he said he was going to kill her and throw her body off the cliff; he told her to take her clothes off or he would rip them off, and she apparently complied; he kept hitting her and then started to choke her; she begged for her life and he relented; although the matter is uncertain, he may ***387 **907** have raped her. He then drove her from the cliff to his mother's house. There, he kept her in the bathroom for a time against her will. He also called Lanet and admitted what he had done. Asking Patricia for time to get away before she called the police, he fled.

As to prior felony convictions, the People presented evidence that on June 8, 1981, defendant was

convicted in Alameda Superior Court of the following offenses, which arose out of the Lisa V./Caren F. incident: two counts of kidnapping; five counts of rape; three counts of rape in concert; two counts of sodomy; one count of lewd or lascivious conduct with a child under fourteen years of age; and one count of oral copulation.

To establish the appropriateness of life imprisonment without possibility of parole, defendant offered in mitigation his background and character. He presented evidence to the following effect.

Defendant was born into a middle-class family in 1961, with a brother and sister already there and another sister to follow. He is apparently of at least average intelligence. His father and mother had a violent, alcoholic marriage and created a violent, alcoholic home. His mother, especially, subjected him to serious neglect and abuse; indeed, she twice attempted to drown him in his bath when he was a baby. As a toddler, he began to experience "night terrors" and convulsions. Early on, he commenced psychotherapy and drug therapy. In school, he exhibited learning disabilities and behavioral problems. As time passed, he started to abuse alcohol and drugs. He soon came to the attention of the juvenile and later the criminal authorities. He proceeded to spend a substantial period of time in correctional facilities, including the Youth Authority and state prison.

It appears that at various points in his life, defendant was diagnosed with various mental conditions. For example, the earliest finding, when he was six or seven years of age in 1967 or 1968, was apparently hyperactivity. The latest, when he was 26 years of age at time of trial in 1988, was borderline personality disorder***255*** —a "significant major mental illness," a "major psychiatric disorder" that "can be just as disruptive as schizophrenia," a condition wherein the subject "exists or lives out [his] life in this borderline between normality and neuroticism and, also, psychosis." There was expert psychiatric testimony that at the time of the present offenses, defendant was mentally impaired. But there was also evidence showing defendant's interest in psychology and suggesting his manipulation of the testifying psychiatrist.

In spite of all, defendant had shown himself to be kind and helpful to several family members, friends, and acquaintances on several occasions. He had become a so-called "born again" Christian evidently between 1976 and 1980 (although possibly between 1981 and 1984). He knew the difference between right and wrong and could act accordingly. Apparently, he had accepted responsibility for his crimes against Marion R., and felt remorse.

In addition to his own background and character, defendant offered the background and character of members of his family. For example, there was testimony that defendant's father and mother each came from violent, alcoholic homes; that his mother was sexually molested by her father when she was about eleven years of age; that for several years during childhood, his father was a catamite for a neighborhood man who gave him gifts in exchange for his favors; that his (defendant's) mother once put his older sister's head in a gas oven when she was a baby and turned the gas on, but failed to carry through; that his father sexually molested that same sister at seven or eight years of age and later in adolescence; that under the influence of alcohol, his father abused his mother, physically and otherwise; and that under the influence of alcohol and drugs, his brother treated his own wife in like fashion.

Lastly, defendant set out the conditions of confinement for a person sentenced to life imprisonment without possibility of parole. Testimony suggested that he could ******388 **908*** live a life of some value in prison and would not be dangerous.

In making his case-in-mitigation, defendant himself did not take the stand.

## II. GUILT ISSUES

Defendant raises a number of claims attacking the judgment as to guilt. As will appear, none is meritorious.

### A. *Claims Relating to IN LIMINE Motions Concerning "Other Crimes" Evidence*

Prior to trial, defendant moved *in limine* to prohibit the People from introducing evidence of prior adjudicated and unadjudicated crimes and ***256*** related conduct—including the Tereza V., Lisa

V./Caren F., and Patricia G. incidents—in order to prove the charges and allegations herein. He claimed, in substance, that such "other crimes" evidence was inadmissible as: (1) irrelevant under Evidence Code section 210; (2) substantially more prejudicial than probative under Evidence Code section 352; and (3) impermissible character evidence under Evidence Code section 1101.

The People made a countermotion, effectively arguing to the contrary as to each of defendant's points. On the question of relevance, their position was that the challenged "other crimes" evidence "go[es] to show the defendant's intent—his intent to achieve sexual intercourse by use of whatever force it takes to cower the woman into sexual submission."

After a hearing, the court expressly granted defendant's motion and impliedly denied the People's countermotion. It determined that the challenged "other crimes" evidence was not irrelevant or impermissible character evidence. As to the former, it stated: "When you get down to intent, the pas [t] acts may have some rational and relevant pull on the question of intent." But it determined that the evidence was indeed substantially more prejudicial than probative because it was unnecessary: "I look at this as being a very[,] very strong case"; "The thing is overwhelming—completely overwhelming"; "I think we have to be very careful in this case that there is not overkill because of the facts involved and the evidence in the case." The court made its decision "without prejudice. In other words, if something occurs during the trial wherein the defense or someone else make[s] it relevant, then I will reconsider it."

For their part, the People moved *in limine* for permission to impeach defendant, should he testify, with five of the felony convictions arising out of the Lisa V./Caren F. incident—specifically, one count each of kidnapping, rape, sodomy, lewd conduct, and oral copulation.

In making their motion, the People relied on article I, section 28, subdivision (f) of the California Constitution and our decision in *People v. Castro* (1985) 38 Cal.3d 301, 211 Cal.Rptr. 719, 696 P.2d 111. The constitutional provision declares in pertinent part that "Any prior felony conviction of any person in any criminal proceeding ... shall subsequently be used without limitation for purposes of impeachment ... in any criminal proceeding." In *Castro*, we held that "prior felony convictions" within the meaning of the constitutional provision are such as necessarily involve moral turpitude, i.e., a readiness to do evil. (38 Cal.3d at pp. 306, 313–317, 211 Cal.Rptr. 719, 696 P.2d 111 (plur. opn. by Kaus, J.); *id.* at p. 322, 211 Cal.Rptr. 719, 696 P.2d 111 (conc. & dis. opn. of Grodin, J.).) There, we also held that trial courts retain their discretion under Evidence Code section 352 to bar impeachment with such convictions when their probative value is substantially ***257** outweighed by their prejudicial effect. (*Id.* at pp. 306–313, 211 Cal.Rptr. 719, 696 P.2d 111 (plur. opn. by Kaus, J.); *id.* at p. 323, 211 Cal.Rptr. 719, 696 P.2d 111 (conc. & dis. opn. of Bird, C.J.).)

Defendant opposed the People's request. He impliedly conceded that the prior felony convictions selected by the People necessarily involved moral turpitude. But he urged that the use of even a single one for impeachment would be unduly prejudicial.

After a hearing, the court granted the People's motion in part and denied it in part. It stated: "[T]he defendant does not ***389 **909** have a right to testify and give the false appearance that he is credible if there is impeaching evidence of prior felony convictions. And what the court must do is weigh the interest of the State and the People and have the truth be known against the defendant's right not to be unduly prejudiced." It went on: "I don't see—I don't know how I should or could allow impeachment on rape since it is exactly the same crime. The kidnapping too I think is too close to this one. But what I will allow is impeachment on one oral copulation, one sodomy and one [lewd conduct]."

Subsequently, in their case-in-chief the People called Susan Lanet as a witness. She testified, inter alia, that in the course of a conversation, defendant admitted that he killed Marion R.

After the People completed their direct examination, defendant sought a ruling from the court. Counsel represented that in order to present evidence on the narrow issue of intent to kill, he proposed to cross-examine Lanet on an extrajudicial statement defendant made to her in the same conversation in which he made his admission—to the effect that he killed Marion R. after a fight that

was related not to sex but to the methamphetamine she evidently had in her possession and to some negative comments she allegedly made about criminals. Counsel asked whether such inquiry would "open[ ] the door" to the introduction of the challenged "other crimes" evidence on the broad issue of defendant's intent in the incident as a whole. The court declined to rule. It opined, however, that "I think you really are standing in the danger in this area." Counsel did not take Lanet on voir dire to determine whether she would actually testify as he had represented.

Defendant did not cross-examine Lanet on the extrajudicial statement identified above. Neither did he take the stand.

Defendant now contends that the court erred by granting the People's *in limine* motion in part and thereby allowing them to impeach him with his prior felony convictions for sodomy, lewd conduct, and oral copulation.

[1] ☑ ***258** In *People v. Collins* (1986) 42 Cal.3d 378, 228 Cal.Rptr. 899, 722 P.2d 173, we established the following rule—which is applicable to trials, like the present, beginning after finality of our decision therein: to preserve a claim such as this, the defendant must testify. (*Id.* at pp. 383-389, 228 Cal.Rptr. 899, 722 P.2d 173 (lead opn. by Mosk, J.); *id.* at p. 396, 228 Cal.Rptr. 899, 722 P.2d 173 (conc. opn. of Lucas, J.); *id.* at p. 397, 228 Cal.Rptr. 899, 722 P.2d 173 (conc. opn. of Grodin, J.).) The reasons for the requirement are three in number.

First, " 'A reviewing court is handicapped in any effort to rule on subtle evidentiary questions outside a factual context.' ... [Evidence Code section 352] requires the trial court to weigh the probative value of the conviction against its prejudicial effect, and 'To perform this balancing, the court must know the precise nature of the defendant's testimony, which is unknowable when, as here, the defendant does not testify.' [Citation.] Likewise, an appellate court cannot review that balancing process unless the record discloses 'the precise nature of the defendant's testimony.' ...

"Second, ... 'Any possible harm' from such an *in limine* ruling is 'wholly speculative.' To begin with, the trial court has discretion to make a different ruling as the evidence unfolds. Next, when the defendant does not testify, the reviewing court also has no way of knowing whether the prosecution would in fact have used the prior conviction to impeach....

"Third, when the trial court errs in ruling the conviction admissible the reviewing court cannot intelligently weigh the prejudicial effect of that error if the defendant did not testify." (*People v. Collins, supra,* 42 Cal.3d at p. 384, 228 Cal.Rptr. 899, 722 P.2d 173 (lead opn. by Mosk, J.), quoting *Luce v. United States* (1984) 469 U.S. 38, 41, 105 S.Ct. 460, 463, 83 L.Ed.2d 443.)

After consideration, we reject the claim at the threshold. Defendant did not testify. Hence, he did not preserve the point.

***390 **910 [2] ☑ Below, defendant acknowledged the rule on the record. Here, he attempts to avoid its force.

To begin with, defendant argues that the rule is inapplicable. In support, he asserts the reasons are absent. Not so. First, we cannot know the "precise nature" of his "testimony"; at best, we may be able to discern the general lines of his extrajudicial statement. Second, we must deem the harm, if any, that may have arisen from the *in limine* ruling "wholly speculative": we can do no more than conjecture whether impeachment would actually have been allowed by the court and undertaken by the People. Third, assuming error, we cannot "intelligently weigh [its] prejudicial effect" because he did not testify.

[3] ☑ [4] ☑ [5] ☑ ***259** Defendant then argues that the rule should not be applied, at least under the circumstances here, because he claims it "may work unfair results." We perceive no unfairness either generally or in this case. FN1

FN1. If we reached the merits, we would be inclined to find the claim wanting. A ruling of the sort in question is reviewed for abuse of discretion. ( *People v. Clair* (1992) 2 Cal.4th 629, 655, 7 Cal.Rptr.2d 564, 828 P.2d 705.) Abuse is not readily apparent. It seems altogether reasonable for the court to have allowed the People to impeach defendant with his prior felony convictions for sodomy, lewd conduct, and oral copulation. Manifestly, each of the three offenses involves moral turpitude. Indeed, there can be no serious argument to the contrary. (Cf. *People v. Mazza* (1985) 175 Cal.App.3d 836, 843-844, 221 Cal.Rptr. 640 [speaking of rape]; see also *People v. Massey* (1987) 192 Cal.App.3d 819, 822-824, 237 Cal.Rptr. 734 [holding that lewd conduct involves moral turpitude]; *People v. Mickle* (1991) 54 Cal.3d 140, 172, 284 Cal.Rptr. 511, 814 P.2d 290 [impliedly approving the *Massey* holding].) True, each of the three offenses bore some resemblance to the crimes charged here—and, as the court itself suggested, may have threatened some potential prejudice for that reason. But none was as close as kidnapping and rape—as to which the court barred impeachment.

Defendant makes an unpersuasive "procedural" argument against the court's ruling. "Of course, 'on a motion invoking [Evidence Code section 352] the record must affirmatively show that the trial judge did in fact weigh prejudice against probative value....' " ( *People v. Mickey* (1991) 54 Cal.3d 612, 656, 286 Cal.Rptr. 801, 818 P.2d 84, quoting *People v. Green* (1980) 27 Cal.3d 1, 25, 164 Cal.Rptr. 1, 609 P.2d 468.) The record here does so. "[N]o more is required. Certainly, the trial judge need not expressly weigh prejudice against probative value—or even expressly state that he has done so [citation]." ( *People v. Mickey, supra,* at p. 656, 286 Cal.Rptr. 801, 818 P.2d 84.)

Defendant also makes an unpersuasive "substantive" argument. The court appears to have made an entirely sound decision. That it may have acted reasonably in barring the use of the challenged "other crimes" evidence for substantive purposes does *not* mean that it acted unreasonably in allowing the use of some such evidence for impeachment.

Defendant next contends that the court erred by ruling that his proposed cross-examination of Susan Lanet would "open the door" to the introduction of the challenged "other crimes" evidence.

[6] This claim, too, we reject at the threshold. No ruling was made below. Accordingly, no review can be conducted here. "[T]he absence of an adverse ruling precludes any appellate challenge." ( *People v. McPeters* (1992) 2 Cal.4th 1148, 1179, 9 Cal.Rptr.2d 834, 832 P.2d 146.) In other words, when, as here the defendant does not secure a ruling, he does not preserve the point. That is the rule. No exception is available.

[7] [8] Defendant may be understood to maintain that the court did not properly decline to rule. Plainly, the appropriate standard of review is abuse of discretion. (See *People v. Keenan* (1988) 46 Cal.3d 478, 513, 250 Cal.Rptr. 550, 758 P.2d 1081.) The question is close. The court was obviously reluctant to make a decision of this kind in anticipation of facts that might subsequently come to light. Generally, such reluctance cannot be faulted. ***260** See *People v. Williams* (1988) 44 Cal.3d 883, 912-913, 245 Cal.Rptr. 336, 751 P.2d 395.) Here, however, defendant expressed a not illegitimate need for a determination. The better course for the court might have been to make a ruling without prejudice. All the same, the course it actually took cannot be deemed unreasonable—especially in light of the fact that counsel did not take Lanet ***391 **911** on voir dire to determine whether she would in fact testify as he had represented.

[9] Defendant argues against the court's stated, but tentative, view that evidence on his extrajudicial statement and the narrow issue of intent to kill might "open the door" to the challenged "other crimes" evidence and the broad issue of intent in the incident as a whole. We are not persuaded. Contrary to defendant's implication, his state of mind *as to the killing* cannot realistically be isolated from his state of mind *as to the criminal activity in its entirety.*

[10] Defendant also argues that the challenged "other crimes" evidence cannot be deemed "relevant" under Evidence Code section 210 to the broad issue of his intent in the incident as a whole. For support, he asserts that such intent was not a "disputed fact" within the meaning of the statutory provision. It was. He relies essentially on language in *People v. Thompson* (1980) 27 Cal.3d 303, 315, 165 Cal.Rptr. 289, 611 P.2d 883, that "The fact that an accused has pleaded not guilty is not sufficient to place the elements of the crimes charged against him 'in issue.' " But in *People v. Williams, supra,* 44 Cal.3d at page 907, footnote 7, 245 Cal.Rptr. 336, 751 P.2d 395, we all but expressly disapproved *Thompson* 's language and held to the contrary. Therefore, a fact—like defendant's intent—generally becomes "disputed" when it is raised by a plea of not guilty or a denial of an allegation. (Pen.Code, § 1019 ["The plea of not guilty puts in issue every material allegation of the accusatory pleading, except those allegations regarding previous convictions of the defendant to which an answer is required by [Penal Code] Section 1025."].) Such a fact remains "disputed" until it is resolved.

[11] Defendant then argues that the challenged "other crimes" evidence cannot be deemed "relevant" under Evidence Code section 210 to the broad issue of his intent in the incident as a whole *even if* such intent was a "disputed fact" within the meaning of the statutory provision. He asserts that such other offenses are insufficiently similar to the offense here to be characterized as probative thereon. We disagree. Although far from identical, the "other crimes" evidence does indeed have *some* tendency to prove the disputed fact of intent in this case. That is all that Evidence Code section 210 requires.

[12] Defendant next argues that the challenged "other crimes" evidence must be held substantially more prejudicial than probative. Again, we disagree. ***261** We recognize that prior to trial, the court considered such evidence unduly prejudicial because it was unnecessary. It does not follow that the court would have been required to arrive at the same conclusion during trial if defendant had, in fact, introduced his extrajudicial statement, through the testimony of Susan Lanet, to the effect that he killed Marion R. after a fight unrelated to sex. In such a case, the court might have properly found the "other crimes" evidence "necessary."

[13] Finally, defendant argues that the challenged "other crimes" evidence would have been impermissible character evidence under Evidence Code section 1101. Not so. Nothing in the statutory provision bars evidence of this sort when, as here, it is relevant to prove a fact other than disposition, including intent. (Evid.Code, § 1101, subd. (b).) "We have long recognized 'that if a person acts similarly in similar situations, he probably harbors the same intent in each instance' [citations], and that such prior conduct may be relevant circumstantial evidence of the actor's most recent intent. The inference to be drawn is not that the actor is *disposed* to commit such acts; instead, the inference to be drawn is that, in light of the first event, the actor, at the time of the second event, must have had the intent attributed to him by the prosecution." (*People v. Robbins* (1988) 45 Cal.3d 867, 879, 248 Cal.Rptr. 172, 755 P.2d 355, italics in original.)

[14] Defendant may also be understood to maintain that the court was required by Evidence Code section 356 to allow him to introduce his extrajudicial statement through the testimony of Susan Lanet without exposure to the challenged "other ***392 **912 crimes" evidence. He asserts that such exposure amounts to an "undue penalty."

It is undisputed, and indisputable, that the court had to permit the extrajudicial statement. The court itself recognized as much. Evidence Code section 356 declares that "Where part of a[ ] ... conversation ... is given in evidence by one party"—as a portion of the interchange between defendant and Lanet was presented by the People—"the whole on the same subject may be inquired into by an adverse party...."

It does not follow, however, that the court had to permit the extrajudicial statement *without exposure to the challenged "other crimes" evidence.* Manifestly, Evidence Code section 356 does not itself require such a result. Neither does any other provision or principle of law. Notwithstanding

defendant's assertion, such exposure cannot be characterized as a "penalty," ***262** "undue" or otherwise. It is simply an apparently proper consequence, no more, no less.[FN2]

> FN2. Defendant claims that by ruling and *not* ruling as it did, the court committed error not only under the Evidence Code, but also under the United States Constitution—including the due process clauses of the Fifth and Fourteenth Amendments; the trial, confrontation, and counsel clauses of the Sixth Amendment; and the cruel and unusual punishments clause of the Eighth Amendment. He failed to make a sufficient argument below based on any federal constitutional provision. (The closest he came which was plainly not close enough—was a perfunctory assertion that the challenged "other crimes" evidence was "inadmissible pursuant to ... [the] United States Constitution[ ]...." Hence, he may not raise such an argument here. (*People v. Gordon* (1990) 50 Cal.3d 1223, 1251–1252, 1264–1265, 270 Cal.Rptr. 451, 792 P.2d 251.) All the same, the court's ruling and "nonruling," whether considered separately or together, did not substantially implicate any federal constitutional guaranty.

B. *Claim Relating to IN LIMINE Motions Concerning "State of Mind" Hearsay Evidence*

Prior to trial, the People moved *in limine* for permission to introduce certain evidence pursuant to the state-of-mind exception to the hearsay rule viz., Jeanne Weems's testimony to the effect that before leaving the Wild Idle Bar on March 16, 1986, Marion R. stated that "she better get herself home because she had a headache and she had to go to work in the morning." The People proposed to offer the evidence, essentially to show lack of consent to sexual intercourse on the part of Marion R., in an effort to prove the charge of rape and the allegation of the felony-murder-rape special circumstance.

Subdivision (b) of Evidence Code section 1200 states the rule that generally, "hearsay evidence is inadmissible." Subdivision (a) of the same provision defines "hearsay evidence" as "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated."

Evidence Code section 1250 establishes the state-of-mind exception. In its subdivision (a), it declares that "Subject to [Evidence Code] Section 1252, evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when: [¶] (1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or [¶] (2) The evidence is offered to prove or explain acts or conduct of the declarant."

Evidence Code section 1252 limits the state-of-mind exception: "Evidence of a statement is inadmissible ... if the statement was made under circumstances such as to indicate its lack of trustworthiness."

***263** For his part, defendant moved *in limine* to prohibit the People from introducing evidence of Marion R.'s extrajudicial statement. He claimed that the evidence was inadmissible as irrelevant, i.e., it did not have a tendency to prove any material fact. He also claimed that the evidence was inadmissible as hearsay not within the state-of-mind exception, i.e., it was untrustworthy because Marion R. (assertedly) spoke the words in order to deceive Weems as she secretly intended to go to a planned meeting with him. He finally claimed that ***393** the ****913** evidence was inadmissible as substantially more prejudicial than probative under Evidence Code section 352, i.e., it would subject him to unfair detriment by compelling him to defend against an uncharged offense of kidnapping and an unalleged special circumstance of felony-murder-kidnapping.

After a hearing, the court granted the People's motion and denied defendant's.

It determined that Marion R.'s extrajudicial statement was relevant. "It seems clear to me that this evidence does have some relevance to the question of whether or not a rape, as opposed to

consensual intercourse, occurred. If indeed the victim's state of mind was to go home and go to bed forthwith and then there is—as the other evidence unfolds, that didn't happen and she ends up having intercourse with someone and there is other evidence that would tend to suggest that there was an interruption in her plans—the manner in which the car was parked and so forth—it sounds as though an inference that could very well be drawn from that was that it was a hurried, or unplanned, or unexpected event."

The court also determined that Marion R.'s extrajudicial statement came within the state-of-mind exception to the hearsay rule. It found the statement trustworthy. "The question of trustworthiness—the only thing to indicate that it's not trustworthy are the inferences that ... the defense wishes to draw, and those certainly are inferences that somebody might draw. I mean, it's something that could be argued from simply the fact that the victim and the defendant were together later in the evening, and it is not outside the realm of human experience that a woman might ... give an excuse to her friends why she's leaving, if she intends to meet with a man. That sort of conduct is not unheard of. On the other hand, I don't see anything in this case that particularly points to that conclusion."

Lastly, the court determined that Marion R.'s extrajudicial statement was not substantially more prejudicial than probative. As noted, it found the evidence relevant to rape. It also found it not unfairly detrimental. "The only question is, by suggesting something that the jury might interpret as a ***264** kidnapping, whether or not they ever receive any instructions on a kidnapping, I don't see that that outweighs the probative value of this evidence. In fact, I find that it does not."

Subsequently, during the People's case-in-chief, Weems testified, inter alia, that before leaving the Wild Idle Bar on March 16, 1986, Marion R. stated that "she was not feeling very well, she had a terrible headache," and that "she had to go to work early the next morning and she needed to go home because she had a terrible headache and she needed to get some sleep."

[15] [16] Defendant contends that by ruling as it did, the court erred. The appropriate standard of review is abuse of discretion. That test is proper when, as here, the determination under attack concerns the admissibility of evidence. (See *People v. Clair, supra,* 2 Cal.4th at p. 671, 7 Cal.Rptr.2d 564, 828 P.2d 705.) Underlying that determination are questions of (1) relevance, (2) hearsay rule/state-of-mind exception, and (3) undue prejudice. Of course, abuse of discretion is appropriate for the first and third issues. ( *Id.* at p. 660, 7 Cal.Rptr.2d 564, 828 P.2d 705.) So too for the second. (Cf. *People v. Gordon, supra,* 50 Cal.3d at pp. 1250–1251, 270 Cal.Rptr. 451, 792 P.2d 251 [dealing with the hearsay rule and the declaration-against-interest exception].) FN3

> FN3. Defendant did not object to Weems's testimony as it was being elicited. His failure to do so is not fatal to his claim. "[A] motion *in limine* to exclude evidence is a sufficient manifestation of objection to protect the record on appeal when it satisfies the basic requirements of Evidence Code section 353, i.e.: (1) a specific legal ground for exclusion is advanced and subsequently raised on appeal; (2) the motion is directed to a particular, identifiable body of evidence; and (3) the motion is made at a time before or during trial when the trial judge can determine the evidentiary question in its appropriate context." ( *People v. Morris* (1991) 53 Cal.3d 152, 190, 279 Cal.Rptr. 720, 807 P.2d 949.) Defendant's motion satisfied these requirements.

***394 **914** Having examined the matter carefully, we find no error.

[17] The court did not abuse its discretion in determining that Marion R.'s extrajudicial statement was relevant. The evidence was clearly probative of rape.

[18] Nor did the court abuse its discretion in determining that Marion R.'s extrajudicial statement came within the state-of-mind exception to the hearsay rule. Its statement of reasons, quoted above, is sound. Defendant argues to the contrary. Here, as below, he attacks the trustworthiness of the extrajudicial statement. The court did not discern indicia of untrustworthiness.

Nor do we. True, as the court itself recognized, Marion R. might possibly have spoken falsely. But such a possibility is not enough.

[19] ☑ ***265*** Neither did the court abuse its discretion in determining that Marion R.'s extrajudicial statement was not substantially more prejudicial than probative. Here too, its statement of reasons, quoted above, is sound. FN4

> FN4. Defendant claims that by ruling as it did, the court committed error not only under the Evidence Code, but also under the United States Constitution—including the due process clauses of the Fifth and Fourteenth Amendments; the confrontation clause of the Sixth Amendment; and the cruel and unusual punishments clause of the Eighth Amendment. He failed to make any argument below based on any federal constitutional provision. Hence, he may not raise such an argument here. In any event, the court's ruling did not substantially implicate any federal constitutional guaranty.

C. *Claim Relating to IN LIMINE Motion Concerning Expert Opinion Testimony on Genital Trauma in Rape*

Prior to trial, defendant moved *in limine* to prohibit the People from introducing expert opinion testimony on genital trauma in rape. The People expressed an intent to offer evidence, through Steven Kent Sierra, M.D., to the effect that the absence of genital trauma is not inconsistent with nonconsensual sexual intercourse. They wished to do so in order to dispel any erroneous belief on the part of any juror that "no genital trauma" means "no rape."

In support of his motion, defendant claimed, inter alia, that the challenged testimony was inadmissible under the *Kelly–Frye* rule ( *People v. Kelly* (1976) 17 Cal.3d 24, 130 Cal.Rptr. 144, 549 P.2d 1240; *Frye v. United States* (D.C.Cir.1923) 293 F. 1013), which conditions the "admissibility of expert testimony based upon the application of a new scientific technique" on a "preliminary showing of general acceptance of the new technique in the relevant scientific community." ( *People v. Kelly, supra,* at p. 30, 130 Cal.Rptr. 144, 549 P.2d 1240.) He relied primarily on *People v. Bledsoe* (1984) 36 Cal.3d 236, 203 Cal.Rptr. 450, 681 P.2d 291. There, we held that evidence of so-called "rape trauma syndrome"—i.e., "an 'umbrella terminology' which includes a very broad spectrum of physical, psychological, and emotional reactions" to rape ( *id.* at p. 241, fn. 4, 203 Cal.Rptr. 450, 681 P.2d 291)—was inadmissible under the *Kelly–Frye* rule as a means of proving that rape had, in fact, occurred. ( *Id.* at pp. 246–251, 203 Cal.Rptr. 450, 681 P.2d 291.) We stated, however, that such evidence "may play a particularly useful role by disabusing the jury of some widely held misconceptions about rape and rape victims, so that it may evaluate the evidence free of the constraints of popular myths." ( *Id.* at pp. 247–248, 203 Cal.Rptr. 450, 681 P.2d 291.)

The People opposed the request, arguing in relevant part that the *Kelly–Frye* rule did not apply and hence that *Bledsoe* did not govern.

After a hearing, the court denied the motion. As pertinent here, it concluded that the *Kelly–Frye* rule was inapplicable: the challenged testimony ***266*** did not rely on a "new scientific technique." It also concluded that *Bledsoe* did not control: legally, the testimony in question did not come within the ambit of the *Kelly–Frye* rule; factually, it did not bear on the rape trauma syndrome; and finally, it was offered not to prove rape but merely to "disprove" "no rape."

***395 **915** Subsequently, during the People's case-in chief, Dr. Sierra was called as a witness to offer expert medical opinion. Before he was summoned, defendant renewed his motion, but was unsuccessful. Dr. Sierra testified that he was a physician with specialties in emergency medicine and diagnostic radiology; was Chief of Emergency Services at Chope Hospital, which had been designated the Sexual Assault Trauma Center for San Mateo County; had physically examined about 300 patients complaining of rape over about 14 years; and was acquainted with the medical literature dealing with rape and related subjects. He opined that the absence of genital trauma is not inconsistent with nonconsensual sexual intercourse.

[20] Defendant contends that by ruling as it did, the court erred. As noted, a decision of this sort, which concerns the admissibility of evidence, is subject to review for abuse of discretion. This is especially so when, as here, the evidence comprises expert opinion testimony. (See *People v. McDonald* (1984) 37 Cal.3d 351, 373, 208 Cal.Rptr. 236, 690 P.2d 709.) Underlying determinations, of course, are scrutinized pursuant to the test appropriate thereto. The conclusion that a certain legal principle, like the *Kelly Frye* rule, is applicable or not in a certain factual situation is examined independently. (Cf. *People v. Clair, supra,* 2 Cal.4th at p. 678, 7 Cal.Rptr.2d 564, 828 P.2d 705 [holding that the conclusion that *Miranda v. Arizona* (1966) 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, does not apply on certain facts is examined independently].)

[21] After review, we find no error. The dispositive question—which plainly subsumes *Bledsoe*—is whether the *Kelly–Frye* rule is applicable to expert medical opinion that the absence of genital trauma is not inconsistent with nonconsensual sexual intercourse. The court answered no. On independent review, we agree. "We have never applied the *Kelly–Frye* rule to expert medical testimony...." ( *People v. McDonald, supra,* 37 Cal.3d at p. 373, 208 Cal.Rptr. 236, 690 P.2d 709.) We shall not do so now. Dr. Sierra's testimony implicated no "new scientific technique" ( *People v. Kelly, supra,* 17 Cal.3d at p. 30, 130 Cal.Rptr. 144, 549 P.2d 1240) within the meaning of the rule. It was based fundamentally on physical examination—by Dr. Sierra himself and by other experts as well. In *People v. Stoll* (1989) 49 Cal.3d 1136, 1157, 265 Cal.Rptr. 111, 783 P.2d 698, we broadly held that "absent some special feature which effectively blindsides the jury, expert opinion testimony is not subject to *Kelly/Frye.*" It is manifest that Dr. Sierra's testimony exhibited no such "special feature."

***267** Defendant claims, in substance, that expert medical opinion that the absence of genital trauma is not inconsistent with nonconsensual sexual intercourse is erroneously admitted unless it is introduced in response to evidence or argument that "no genital trauma" means "no rape"—a condition that he asserts was not met here. We reject the point. Defendant's analysis lacks compelling authority or persuasive reasoning. Indeed, it merely proves that such expert medical opinion is proper as a response—not that it is proper *only* as a response.[FN5]

> FN5. Defendant claims that by ruling as it did, the court committed error not only under the *Kelly–Frye* rule, but also under the United States Constitution—including the due process clauses of the Fifth and Fourteenth Amendments. He failed to make any argument below based on any federal constitutional provision. Hence, he may not raise such an argument here. In any event, the court's ruling did not substantially implicate any federal constitutional guaranty.

D. *Claim Relating to IN LIMINE Motion for Separate Juries at the Guilt and Penalty Phases*

Prior to trial, defendant moved *in limine* for an order directing the impanelment of one jury to try guilt and death eligibility and, if necessary, the impanelment of another to try penalty.

Defendant relied, inter alia, on Penal Code section 190.4, subdivision (c), which states in pertinent part: "If the trier of fact which convicted the defendant of a crime for which he may be subject to the death penalty was a jury, the same jury ***396 **916** shall consider ... the truth of any special circumstances which may be alleged, and the penalty to be applied, unless for good cause shown the court discharges that jury in which case a new jury shall be drawn."

As relevant here, defendant's argument was effectively bottomed on the desire of counsel to examine prospective jurors in one way for the guilt phase and in a different way for the penalty phase. Counsel expressed a belief that "other crimes" evidence might not be presented in the former but would be presented in the latter. They wished to voir dire prospective penalty phase jurors on such evidence, but not prospective guilt phase jurors.

The People opposed the request. They argued that defendant was premature and, in any event, had not shown good cause.

After a hearing, the court granted the motion. It ordered that "If the defendant is convicted and if the special circumstances [ *sic* ] are found, we will discharge the first jury and choose another jury."

Thereupon, the People filed a petition for writ of mandate in the Court of Appeal for the First Appellate District. In a published opinion, Division ***268** Three of that court caused issuance of a peremptory writ in the first instance, directing the court to vacate its order. ( *People v. Superior Court (Rowland)* (1987) 194 Cal.App.3d 11, 239 Cal.Rptr. 257.) It reasoned that "Penal Code section 190.4, subdivision (c), ... does not permit a pretrial 'discharge' of the guilt phase jury": the court is simply "without jurisdiction to entertain a pretrial motion for a second jury." ( *Id.* at p. 13, 239 Cal.Rptr. 257.)

Between the guilt and penalty phases, defendant renewed his motion. This time, the court denied relief, finding no good cause therefor.

[22] ☑ Defendant contends that by denying his renewed motion, the court erred.[FN6]

FN6. Defendant requests us to take judicial notice of the record filed in the Court of Appeal in *People v. Superior Court (Rowland), supra,* 194 Cal.App.3d 11, 239 Cal.Rptr. 257. We may, of course, "take judicial notice" (Evid.Code, § 459, subd. (a)) of the "[r]ecords of ... any court of this state" ( *id.*, § 452, subd. (d)). We fail to see—and certainly, defendant fails to show—the relevance of the subject record. From all that appears, the court did not make any determination in light thereof. "Because ... no evidence is admissible except relevant evidence, it is reasonable to hold that judicial notice, which is a substitute for formal proof of a matter by evidence, cannot be taken of any matter that is irrelevant...." (2 Jefferson, Cal.Evidence Benchbook (2d ed. 1982) Judicial Notice, § 47.1, p. 1749.) Consequently, we deny the request.

[23] ☑ The appropriate standard of review is abuse of discretion. (See *People v. Beardslee* (1991) 53 Cal.3d 68, 101–102, 279 Cal.Rptr. 276, 806 P.2d 1311.)

[24] ☑ No abuse appears. In *People v. Nicolaus* (1991) 54 Cal.3d 551, 286 Cal.Rptr. 628, 817 P.2d 893, we recognized that Penal Code section 190.4, subdivision (c), "expresses a clear legislative intent that both the guilt and penalty phases of a capital trial be tried by the same jury." (54 Cal.3d at p. 572, 286 Cal.Rptr. 628, 817 P.2d 893.) There, we held that the "mere desire" of defense counsel "to voir dire in one way for the guilt phase and a different way for the penalty phase" "does not constitute 'good cause' for deviating from the clear legislative mandate...." ( *Id.* at pp. 573–574, 286 Cal.Rptr. 628, 817 P.2d 893.) Here, such a "desire" existed—and substantially nothing more. We understand counsel's wishes in this regard. But we cannot deem them sufficient.

[25] ☑ Defendant may be understood to argue that the court's order granting his original motion was sound, and should not have been disturbed by the Court of Appeal. We are not persuaded. It is true, contrary to the Court of Appeal's conclusion, that the court had authority to entertain the motion, even though it was made prior to trial. (See ***269** *People v. Beardslee, supra,* 53 Cal.3d at pp. 101–102, 279 Cal.Rptr. 276, 806 P.2d 1311.) But it is also true, for the reasons stated above, that the court did not have discretion to order the relief sought.[FN7]

FN7. Defendant claims that by denying his renewed motion, the court committed error not only under Penal Code section 190.4, subdivision (c), but also under the United States Constitution (including the trial and counsel clauses of the Sixth Amendment, the cruel and unusual punishments clause of the Eighth Amendment, and the due process clause of the Fourteenth Amendment) and the California Constitution (including the jury trial clause of article I, section 16). He failed to make a sufficient argument below based on any constitutional provision. Hence, he may not raise such an argument here. In any

event, the court's ruling did not substantially implicate any constitutional guaranty.

***397 **917 E. *Sufficiency of the Evidence for the Rape Conviction*

Defendant contends that the evidence is insufficient to support his conviction for rape.

[26] In reviewing the sufficiency of evidence under the due process clause of the Fourteenth Amendment to the United States Constitution, the question we ask is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560, italics in original.) To our mind, we must ask the same question when we conduct such review under the due process clause of article I, section 15 of the California Constitution.

[27] A state court conviction that is not supported by sufficient evidence violates the due process clause of the Fourteenth Amendment and is invalid for that reason. (*Jackson v. Virginia, supra*, 443 U.S. at pp. 313-324, 99 S.Ct. at 2785-2792.) In our view, a California conviction without adequate support separately and independently offends, and falls under, the due process clause of article I, section 15.

Defendant's claim is to the following effect: although the evidence is sufficient to prove that he engaged in sexual intercourse with Marlon R., it is insufficient to prove that he did so while she was alive *or* without her consent.

[28] Of course, in rape the act of sexual intercourse must involve a live victim (*People v. Kelly* (1992) 1 Cal.4th 495, 524, 3 Cal.Rptr.2d 677, 822 P.2d 385) who does not effectively consent (see Pen.Code, § 261).

[29] The evidence is more than sufficient on each point. To support our conclusion, we need cite only this. There was expert testimony that before ***270** death, Marlon R. suffered a bruise "an inch or two above the [right] kneecap and somewhat towards the inside part of the thigh"; the location of the injury was "unusual"; such a bruise, however, could have been caused "if someone used a knee ... to force the legs apart." Relying on that testimony, as it would plainly have been entitled to, a rational trier of fact could surely have found beyond a reasonable doubt that at the time defendant engaged in sexual intercourse, Marlon R. was alive *and* did not consent.

Defendant argues to the contrary. His words establish nothing more than that some rational trier of fact might have made a different finding. That is not enough.[FN8]

FN8. Defendant claims that his rape conviction, if based on evidence that is insufficient for the due process clause of the Fourteenth Amendment, is invalid not only under that federal constitutional provision but under others as well—including some unspecified clause of the Sixth Amendment and, perhaps, the cruel and unusual punishments clause of the Eighth Amendment. The conviction is *not* based on insufficient evidence.

## III. DEATH-ELIGIBILITY ISSUES

[30] Defendant challenges the determination that he was subject to the death penalty. As relevant here, death eligibility is established when the defendant is convicted of murder in the first degree under at least one special circumstance. (Pen.Code, § 190.3.) As shown above, defendant has not successfully attacked the jury's verdict of guilty as to murder in the first degree. As shown below, he does not successfully attack its felony-murder-rape special-circumstance finding. Hence, the challenge fails.

A. *Instruction on the Felony-murder-rape Special Circumstance*

[31] The felony-murder-rape special circumstance is defined as the commission of "murder ... while the defendant was engaged in or was an accomplice in the commission***398 **918 of, attempted commission of, or the immediate flight after committing or attempting to commit," the felony of rape. (Pen.Code, § 190.2, subd. (a)(17)(iii).)

The court instructed the jury that in order to find the felony-murder-rape special-circumstance allegation to be true, it was required to find, among other facts, that "the murder was committed while the defendant was engaged in the commission of a rape." At trial, there was no request for explanation or amplification, either by the People or by defendant.

Defendant now contends that the court erred by failing to define the phrase "while engaged in" sua sponte.

The court did not err. When, as here, a phrase "is commonly understood by those familiar with the English language and is not used in a technical *271 sense peculiar to the law, the court is not required to give an instruction as to its meaning in the absence of a request." (*People v. Bonin* (1988) 46 Cal.3d 659, 698, 250 Cal.Rptr. 687, 758 P.2d 1217.) As noted, there was no such request. (Compare *People v. Guzman* (1988) 45 Cal.3d 915, 949–952, 248 Cal.Rptr. 467, 755 P.2d 917 [concluding that a similar instructional omission was nonerroneous on a similar record].) FN9

FN9. In passing, we note that it is manifest why defendant did not request an instruction on the meaning of the phrase "while engaged in" at trial. His defense was predicated on the assertion that there was no rape—specifically, no *nonconsensual* sexual intercourse in the first place. Obviously, this defense proved unsuccessful. But it was not unreasonable.

Defendant claims that the court did indeed err. His argument is not persuasive. For example, he asserts that the phrase "while engaged in" was, in fact, used in a technical sense. Not so. We agree that the application of the words to a given set of facts may prove uncertain. But we do not agree that the words themselves are somehow unclear. He also asserts that the phrase does not adequately define the requisite temporal relationship between the murder and the rape. This point is essentially a restatement of the preceding. It also fails. Lastly, he asserts that the phrase was somehow rendered ambiguous by the prosecutor's summation and other instructions. The record is otherwise.FN10

FN10. Defendant claims in substance that by erring under California law, the court erred as well under the United States Constitution—including, apparently, the due process clause of the Fourteenth Amendment. There *was* no error under California law.

B. *Sufficiency of the Evidence for the Felony-murder-rape Special-circumstance Finding*

[32] Defendant contends that the evidence is insufficient to support the felony-murder-rape special-circumstance finding.

"In reviewing the sufficiency of evidence for a special circumstance"—as for a conviction—"the question we ask is whether, after viewing the evidence in the light most favorable to the People, *any* rational trier of fact could have found the essential elements of the allegation beyond a reasonable doubt." (*People v. Mickey, supra,* 54 Cal.3d at p. 678, 286 Cal.Rptr. 801, 818 P.2d 84, italics in original.) FN11

FN11. We need not, and do not, reach the question whether the sufficiency-of-evidence review specified in the text is required under the due process clause of the Fourteenth Amendment to the United States Constitution and/or the due process clause of article I, section 15 of the California Constitution.

Defendant's claim is that the evidence is insufficient to prove that he murdered Marion R. "while engaged in" rape. We disagree. A rational trier of fact could have found the requisite temporal relationship between the ***272** two crimes beyond a reasonable doubt. The evidence showed that defendant killed Marion R. in the course of a fight. Defendant admitted as much in his extrajudicial statement to Susan Lanet. The evidence also showed that the fight involved rape. Defendant's position at trial was that there was no rape—specifically, no *nonconsensual* sexual intercourse. But the expert testimony about the "unusual" ante mortem bruise "an inch or two above the [right] kneecap and somewhat towards the inside part of the thigh" was plainly to the contrary.

****399** ***919** Again, defendant argues to the contrary. Again, his words establish nothing more than that some rational trier of fact might have made a different finding. Again, that is not enough. To the extent that he asserts that for purposes of the felony-murder-rape special circumstance, the defendant must commit murder and rape virtually simultaneously, he is simply wrong. By its very terms, the special circumstance extends even to murder during the "immediate flight after" rape. (Pen.Code, § 190.2, subd. (a)(17)(iii).) FN12

FN12. Defendant may be understood to claim that the felony-murder-rape special-circumstance finding, if based on evidence that is insufficient for the due process clause of the Fourteenth Amendment, is invalid not only under that federal constitutional provision but under others as well—including some unspecified clause of the Sixth Amendment and, perhaps, the cruel and unusual punishments clause of the Eighth Amendment. As noted, we need not, and do not, reach the due process question. (See fn. 11, *ante.*) In any event, the finding is *not* based on insufficient evidence.

## IV. PENALTY ISSUES

Defendant raises a number of claims attacking the judgment as to penalty. As will appear, none is meritorious.

### A. *Motion to Bar Testimony by Caren F.*

[33] As noted, at the penalty phase the People sought to prove several instances of other violent criminal activity—one of the issues material to penalty under Penal Code section 190.3—including the Lisa V./Caren F. incident.

In the People's case-in-aggravation, Lisa V. testified on direct examination to matters including the following: on November 7, 1980, when she was thirteen years old, defendant and another man kidnapped her and her friend Caren F. in Fremont; Caren escaped; she attempted to, but failed; defendant helped the other man rape her twice; defendant himself raped her four times,FN13 caused her to orally copulate him, sodomized her twice, and fondled her genital organs and other parts of her body; during the attack, he repeatedly threatened her with death if she resisted. Lisa was not cross-examined.

FN13. Documentary evidence showed that defendant had, in fact, raped Lisa V. six times.

***273** Outside the presence of the jury, defendant moved to prohibit any testimony by Caren F., claiming, inter alia, that such evidence would be substantially more prejudicial than probative under Evidence Code section 352. Stating that he had not cross-examined Lisa V. and would not cross-examine Caren F., counsel argued that the testimony in question would be "cumulative," "[t]ime consuming," and inflammatory. The prosecutor opposed the request. He represented that Caren would testify to the kidnapping she herself had suffered at the hands of defendant and his partner, and to limited surrounding facts. The court denied the motion. It determined that the testimony as represented would be "relevant" and "neither excessively time consuming nor cumulative. I think its probative value outweigh[s] any possible prejudice that may be from the fact that there may be some cumulative aspects to it...."

Caren F. then testified on direct examination to matters including the following: on November 7, 1980, when she was 13 years old, defendant and another man kidnapped her and her friend Lisa V. in Fremont; she escaped; Lisa attempted to, but failed. Caren was not cross-examined.

Defendant now contends that by denying his motion, the court erred. We disagree. No abuse of discretion appears. Caren F.'s testimony as represented to the court was highly probative: it was direct evidence, from her own lips, of the kidnapping she herself had suffered. Moreover, it was minimally prejudicial: it was insignificantly cumulative, limited in extent, and not at all inflammatory. The same is true of Caren's testimony as subsequently presented to the jury. There was no error. There could be no prejudice.[FN14]

> FN14. Defendant claims that by denying his motion, the court committed error not only under Evidence Code section 352, but also under the United States Constitution, including the due process clause of the Fourteenth Amendment. He failed to make an argument below based on any federal constitutional provision. Hence, he may not raise such an argument here. In any event, the court's ruling did not substantially implicate any federal constitutional guaranty. Contrary to his assertion, Caren F.'s testimony was not inflammatory as represented to the court. Neither was it inflammatory as subsequently presented to the jury.

***400 **920 B. *Ineffective Assistance of Counsel*

Defendant contends that trial counsel provided him with ineffective assistance under the Sixth Amendment to the United States Constitution by failing to call Susan Lanet as a witness in order to elicit his extrajudicial statement to the effect that he killed Marion R. after a fight unrelated to sex.

[34] To succeed in his claim, defendant must show (1) deficient performance under an objective standard of professional reasonableness and (2) prejudice ***274** under a test of reasonable probability. (E.g., *People v. Ledesma* (1987) 43 Cal.3d 171, 215–218, 233 Cal.Rptr. 404, 729 P.2d 839.)

[35] [36] Defendant fails in his attempt. Counsel's performance was not deficient because the omission was not unreasonable. In view of the evidence concerning the circumstances of the present offenses adduced at the guilt phase, counsel could properly have declined to reopen the matter—especially through a self-serving, out-of-court statement by defendant. Moreover, even if counsel's performance had been deficient, it could not have subjected defendant to prejudice. There is no reasonable probability that the introduction of a statement of the sort here would have affected the outcome. [FN15]

> FN15. Defendant claims that trial counsel's ineffective assistance under the Sixth Amendment entailed the violation of various provisions of the United States Constitution, including the due process clauses of the Fifth and Fourteenth Amendments; the trial clause of the Sixth Amendment; and the cruel and unusual punishments clause of the Eighth Amendment. But as shown, counsel's assistance was *not* ineffective.
>
> Evidently, defendant does not claim that trial counsel provided him with ineffective assistance under article I, section 15 of the California Constitution. If he did, he would fail. To establish such a point under the state constitutional provision as under the federal, he would be required to show (1) deficient performance under an objective standard of professional reasonableness and (2) prejudice under a test of reasonable probability. ( *People v. Ledesma, supra,* 43 Cal.3d at pp. 215–218, 233 Cal.Rptr. 404, 729 P.2d 839.) As explained above, he cannot do so.

C. *Prosecutorial Misconduct*

Defendant contends that the prosecutor engaged in misconduct on several occasions in the course

of the penalty phase, in violation of California law and/or the United States Constitution, as he adduced evidence and presented argument before the jury.

"In general, a prosecutor commits misconduct by the use of deceptive or reprehensible methods to persuade either the court or the jury." ( *People v. Price* (1991) 1 Cal.4th 324, 447, 3 Cal.Rptr.2d 106, 821 P.2d 610.)

" 'It is, of course, the general rule that a defendant cannot complain on appeal of misconduct by a prosecutor at trial unless in a timely fashion he made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety.' [Citation.] There are, indeed, certain exceptions. For example, the rule is inapplicable when the harm could not have been cured. [Citation.] But there is no exception for capital trials as such." ( *People v. Clair, supra,* 2 Cal.4th at p. 662, 7 Cal.Rptr.2d 564, 828 P.2d 705, quoting *People v. Benson* (1990) 52 Cal.3d 754, 794, 276 Cal.Rptr. 827, 802 P.2d 330.)

[37] In all respects save one, we reject the claim of misconduct on procedural grounds. In all but a single instance, the rule requiring assignment of ***275** misconduct and request for admonition was not satisfied: defense counsel did not make any objection of any kind on any basis. Further, no exception appears. For instance, contrary to defendant's assertion, any "harm" was readily curable. And, as stated, there is no exception for capital trials—"not even for the penalty phase thereof" ( *People v. Clair, supra,* 2 Cal.4th at p. 685, 7 Cal.Rptr.2d 564, 828 P.2d 705).

In all respects without qualification, we reject the claim of misconduct on the merits::***401 ****921** there was no impropriety. Our reasons follow.

Defendant first complains of the prosecutor's unobjected-to cross-examination of defense witness James W.L. Park, a "correctional consultant."

On direct examination, defense counsel elicited brief testimony from Park on the conditions of confinement for a person sentenced to life imprisonment without possibility of parole. He did so in an evident attempt to show substantial restrictions on freedom and minimal opportunities for violence.

On cross-examination, the prosecutor elicited testimony from Park that was briefer still on the same matter, including such specific topics as the availability of privileges, access to illicit drugs and alcohol, and the presence of women among prison staff. He did so in an evident attempt to make a showing contrary to defense counsel's, indicating the liberties that might be enjoyed and the occasions that might arise for inflicting physical harm, sexual and otherwise.

[38] [39] [40] [41] A prosecutor, of course, may seek to disprove on cross-examination what defense counsel sought to prove on direct examination. ( *People v. Gordon, supra,* 50 Cal.3d at p. 1270, 270 Cal.Rptr. 451, 792 P.2d 251.) The prosecutor here did that—and substantially nothing more. Defendant asserts that the inquiry on cross-examination went beyond that on direct examination, improperly touching on such issues as future dangerousness. The assertion, however, is not supported by the record. FN16

> FN16. Defendant claims that the evidence elicited on cross-examination was inadmissible under both California law and the United States Constitution. We reject the point. "It is, of course, 'the general rule that questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal.' " ( *People v. Benson, supra,* 52 Cal.3d at p. 786, fn. 7, 276 Cal.Rptr. 827, 802 P.2d 330, quoting *People v. Rogers* (1978) 21 Cal.3d 542, 548, 146 Cal.Rptr. 732, 579 P.2d 1048.) At trial, defense counsel failed to make any objection whatever. Contrary to what defendant appears to argue, the omission did not constitute ineffective assistance in violation of the Sixth Amendment. Counsel's performance was not deficient: it was not "objectively unreasonable ... to remain silent and thereby call no attention to the prosecutor's [questioning]" ( *People v. Gordon, supra,* 50 Cal.3d at p. 1256, fn. 7, 270 Cal.Rptr. 451, 792 P.2d 251)—especially when, as

here, the questioning was relatively brief.

> Defendant also claims that the prosecutor engaged in misconduct by referring in his summation to the evidence elicited on cross-examination. There was no objection. In any event, there was no impropriety. The challenged comments comprised an unproblematic argument to the effect that life imprisonment without possibility of parole was not the appropriate punishment in this case. There is no reasonable likelihood that the jury understood the words otherwise. ( *People v. Clair, supra,* 2 Cal.4th at pp. 662–663, 7 Cal.Rptr.2d 564, 828 P.2d 705 [stating the "reasonable likelihood" standard as the test for determining whether the jury misconstrued or misapplied comments by a prosecutor].)

[42] ☑ Second, defendant complains of certain unobjected-to comments in the prosecutor's summation that allegedly misled the jury on its role in determining penalty.

***276** In context, the message the prosecutor delivered was this: the jurors' function was judicial, not legislative; they had to decide whether the death penalty was the appropriate punishment in this case, not whether it should be available as a sanction in general. That message, of course, was altogether sound.

We do not overlook and certainly do not approve—such remarks as this: "We had a recent election in which several of our Supreme Court justices were perceived by the voters not to be applying [the death penalty] law. They are gone now. There's no question that it is the policy expressed by the will of the populace that there be a death penalty in California, and that it be carried out in appropriate cases." Or this: "[T]he voters overwhelmingly approved the death penalty...."

Nevertheless, there is no reasonable likelihood that the jury understood the challenged remarks as defendant asserts and surely not in such a way as to "minimize [its] sense of responsibility for determining the appropriateness of death" in violation of the Eighth Amendment to the United ***402 **922** States Constitution as construed in *Caldwell v. Mississippi* (1985) 472 U.S. 320, 341, 105 S.Ct. 2633, 2646, 86 L.Ed.2d 231.

[43] ☑ Third, defendant complains of certain unobjected-to comments in the prosecutor's summation that disparaged psychiatry and psychiatrists, including defense witness Hugh Wilson Ridlehuber, M.D.

The challenged remarks were indeed harsh and unbecoming. For example, at one point the prosecutor stated: "But as a lawyer, you know, when all else fails, you call in the psychiatrists. It's the kind of thing that has caused such controversy in the public about the role of psychiatry in the courtroom. I think that it's no secret that psychiatry is guesswork, conjecture, theories, untested theories."

At another: "And psychiatrists just can't accept that some people make bad choices because they make bad choices. They have to find reasons for it. ***277** And they delve back in the past, and they guess and conjecture, and they come up with things to excuse responsibility. Now, the thing that was most disturbing about that is the quality of this man's [i.e., Dr. Ridlehuber's] testimony. Sure, he knows all the words. He's an educated man. He's eloquent. He's got a good background. And why he chooses to use it for this purpose, to use his education and training for what he does, I don't know."

At yet another: "Apparently, he [i.e., Dr. Ridlehuber] was hired to see if there was something ... he could find to explain this behavior. And he found it."

Although harsh and unbecoming, the challenged remarks constituted reasonable—if hyperbolic and tendentious—inferences from the evidence. There is no reasonable likelihood that the jury understood the words otherwise.

For instance, Dr. Ridlehuber himself admitted that "psychiatry is not an exact science"; that

psychiatrists rely on what they are told by their patients, who sometimes lie; that "two equally competent psychiatrists can conduct an examination on an individual and come to different conclusions"; and that psychiatrists "can be fooled, and I've been fooled." Also, as noted, there was evidence showing defendant's interest in psychology and suggesting manipulation on his part.

Moreover, in his opening statement at the penalty phase defense counsel indicated that Dr. Ridlehuber would testify that he had arrived at a different diagnosis from that of other, unnamed persons—even though at the time of the opening statement Dr. Ridlehuber (as he subsequently revealed) had not yet arrived at a diagnosis.

In the challenged remarks, the prosecutor did not substantially misstate the facts or go beyond the record. Surely, his personal attack on Dr. Ridlehuber "was somewhat insulting in its implications...." ( *People v. Frank* (1990) 51 Cal.3d 718, 737, 274 Cal.Rptr. 372, 798 P.2d 1215.) But it did not amount to a deceptive or reprehensible method of persuasion.

[44] ☑ Fourth, defendant complains of certain unobjected-to comments in the prosecutor's summation that allegedly suggested that the "judicial system unfairly protects the defendant at the expense of ignoring the victim." (Initial capitalization omitted.) FN17

FN17. The comments in question are set out below.

"And mercy is another theme you're going to hear....

"As you're thinking about mercy for Guy Rowland, I want to give you the counter thing that I think you should be thinking about.

"Think about the mercy that this man granted to Marlon [R.]....

"I want to read you a brief paragraph from the book called, 'The Killing of Bonnie Garland.' It's a case that occurred back in New York, Albany. A man named Willard Gatland, a psychiatrist, wrote a book about it. In the prologue he makes an interesting observation. I'd like to point that out to you.

" 'When one person kills another, there is an immediate revulsion at the nature of the crime. But in a time so short as to seem indescent [ *sic* ] to the members of the personal family, the dead person ceases to exist as an identifiable figure.

" 'To those individuals in the community of goodwill and empathy, warmth and compassion, only one of the key actors in the drama remains with whom to commiserate; and that is always the criminal.

" 'The dead person ceases to be a part of every day reality; ceases to exist. She is only a figure in a historic event.

" 'And we inevitably turn away from the past towards the ongoing reality. And the ongoing reality is the criminal; trapped, anxious, now helpless, isolated, perhaps badgered, perhaps bewildered. He ursurps [ *sic* ] the compassion that is justly the victim's. And he will steal his victim's moral constituency along with her life.'

"Don't let that happen. He does not deserve your sympathy. He doesn't deserve your goodwill. He doesn't deserve your pity. He doesn't deserve your warmth. He doesn't deserve your compassion. He doesn't deserve your mercy, nor does he deserve your leniency."

***403 **923** We believe that the jury must have taken the challenged remarks at face value: in determining penalty, it was required to consider not only the ***278** criminal but also his crime. That proposition is manifestly sound. Defendant asserts that "[t]he prosecutor's remarks ... had only one thrust—use of the judicial process is a further aggravation of the crime." There is simply no reasonable likelihood that the jury so understood the words.

[45] Fifth, defendant complains of the following unobjected-to comment in the prosecutor's summation: "And his mother—I think his mother understands justice, to some extent. Because when asked about anything that she wanted to tell you, she really couldn't bring herself to tell you that he didn't deserve the death penalty based on the evidence that you had before you. Instead, what she said was her religion says that there shouldn't be a death penalty."

The challenged remark constituted a fair comment on the evidence. There is no reasonable likelihood that the jury would have understood the words otherwise.

Sixth, defendant complains of unobjected-to comments in the prosecutor's summation to the effect that in determining penalty, the jury could consider evidence bearing on defendant's background but not his family's.

[46] The defendant's background is, of course, material to penalty. That is true under California law (see, e.g., *People v. Boyd* (1985) 38 Cal.3d 762, 775, 215 Cal.Rptr. 1, 700 P.2d 782, following *People v. Easley* (1983) 34 Cal.3d 858, 877–878, 196 Cal.Rptr. 309, 671 P.2d 813 [impliedly construing ***279** Pen.Code, § 190.3] ) and the United States Constitution (see, e.g., *Eddings v. Oklahoma* (1982) 455 U.S. 104, 110, 102 S.Ct. 869, 874, 71 L.Ed.2d 1, following *Lockett v. Ohio* (1978) 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (plur. opn. by Burger, C.J.) [construing U.S. Const., Amend. VIII, as applied to the states through the due process clause of Amend. XIV] ). The conclusion follows from the proposition that "the sentencer ... [may] not be precluded from considering, *as a mitigating factor,* any aspect of a defendant's character or record ... that the defendant proffers as a basis for a sentence less than death." ( *Lockett v. Ohio, supra,* at p. 604, 98 S.Ct., at pp. 2964–2965, italics in original (plur. opn. by Burger, C.J.) [construing U.S. Const., Amend. VIII, as applied to the states through the due process clause of Amend. XIV]; accord, *People v. Easley, supra,* at pp. 877–878, 196 Cal.Rptr. 309, 671 P.2d 813 [impliedly construing Pen.Code, § 190.3].)

By contrast, the background of the *defendant's family* is of no consequence in and of itself. That is because under both California law (e.g., *People v. Gallego* (1990) 52 Cal.3d 115, 207, 276 Cal.Rptr. 679, 802 P.2d 169 (conc. opn. of Mosk, J.) [construing Pen.Code, § 190 et seq.] ) and the United States Constitution (e.g., *Enmund v. Florida* (1982) 458 U.S. 782, 801, 102 S.Ct. 3368, 3378, 73 L.Ed.2d 1140 [construing U.S. Const., Amend. VIII] ), the determination of punishment in a capital case turns on the defendant's personal moral culpability. It is the " *defendant's* character or record" that "the sentencer ... [may] not be precluded from considering"—not *his family's.* ( *Lockett v. Ohio, supra,* 438 U.S. at p. 604, 98 S.Ct. at p. 2964, italics added (plur. opn. by Burger, C.J.); compare *People v. Cooper* (1991) 53 Cal.3d 771, 844 & fn. 14, 281 Cal.Rptr. 90, 809 P.2d 865 [leaving open the question whether the "impact [of a death verdict] on the defendant's family" is material under U.S. Const., Amend. VIII]; ***404 **924** *People v. Fierro* (1991) 1 Cal.4th 173, 243, 3 Cal.Rptr.2d 426, 821 P.2d 1302 [following *Cooper* ].)

[47] To be sure, the background of the defendant's family is material if, and to the extent that, it relates to the background of defendant himself. But that very point emerges from the challenged remarks. For example, the prosecutor stated: "Again, think back and decide how much of this extremely emotional and painful testimony you heard about Guy Rowland's family applies to him

rather than other people. The things that don't apply to him are not things you can consider in determining whether or not Guy Rowland is entitled to sympathy." Thus—the prosecutor declared expressly—the background of defendant's family does not matter if it does not touch his ***280** own. But he implied—family background does count if it involves defendant himself. There is no reasonable likelihood that the jury understood the words otherwise.[FN18]

FN18. Defendant claims that defense counsel provided ineffective assistance in violation of the Sixth Amendment by failing to object to the "misconduct." He also claims that the court committed error apparently under California law by neglecting to prevent or cure the "harm" arising therefrom *ex proprio motu.* There *was* no impropriety.

[48] ☑ Seventh, defendant complains of the concluding comments in the prosecutor's summation.

"... And I've made a long practice in my life never to ask others to do what I would not feel is right, and what I would not do myself.

"I believe strongly in the sanctity of human life, and I would not ask you to do something that I would not do. And I believe in human life. But I also believe that society has the right, in fact the duty, to protect itself and to see that justice is done in the appropriate cases.

"And based in the system of justice where the punishment should fit the crime and the criminal, based on the law in this case ..., based on the savagery, and the brutality, and the horror of the crime against Marlon [R.], based on his history of past criminal activity involving violence which represents a man of extreme cruelty, depravity, and violence, I now stand before you, and with a full realization of the awesome responsibility that's been entrusted to you and to me, and with a full realization of the gravity and the enormity of what I am about to ask you, without reservation, without hesitation, I am asking that you return a verdict of death."

Outside the presence of the jury, defense counsel requested the court "to instruct the jury on one comment made by [the prosecutor]. And that went to his personal opinion in this matter concerning the sentence of death. I think that's improper under the cases. And I would ask the court to admonish the jury that they should not consider [the prosecutor's] personal feelings in arriving at the appropriate penalty."

The court refused. "I think the prohibition goes to personal belief in evidence, evidence not before the jury. And he very carefully didn't do that. I know of no rule of law to support the action you're requesting. I think it's an appropriate argument. He very carefully didn't imply that he knows something that the jury doesn't know. I think it's an appropriate argument."

We agree. True, a prosecutor may not "state his personal belief regarding ... the appropriateness of the death penalty, *based on facts not in evidence.* " ***281** (*People v. Ghent* (1987) 43 Cal.3d 739, 772, 239 Cal.Rptr. 82, 739 P.2d 1250, italics in original.) But he may make a statement of this sort if, as here, it is "based solely on the facts of record." (*Ibid.*) There is no reasonable likelihood that the jury understood the words otherwise. Of course, "prosecutors should refrain from expressing personal views which might unduly inflame the jury against the defendant." (*Ibid.*) The views expressed by the prosecutor in this case were not such.[FN19]

FN19. Defendant generally claims that defense counsel provided ineffective assistance in violation of the Sixth Amendment by failing to object to the various instances of "misconduct." (Compare fn. 18, *ante.*) Further, he generally claims that the court committed error apparently under California law by neglecting to prevent or cure the "harm" arising therefrom *ex proprio motu.* (Compare *ibid.*) There *was* no impropriety.

Defendant also claims that the various instances of "misconduct" entailed the violation of both California law and the United States Constitution. Again, there *was* no

impropriety.

***405 **925 D. *Instruction on Consciousness of Guilt*

[49] The People requested the court to instruct the jury at the penalty phase, as it had already done at the guilt phase, in accordance with a modified version of CALJIC No. 2.06 (4th ed. 1983 rev.), a pattern instruction dealing with consciousness of guilt on the part of a defendant as revealed by efforts to suppress evidence. Defendant objected.

The court stated: "... I don't have a clear feeling about how much is consciousness of guilt of the crimes of which he's just been convicted have [ *sic* ] to do with the penalty phase."

The prosecutor responded: "The problem is the jury is intended to consider the facts and circumstances of that crime and its surroundings in determining what penalty ought to be appropriate here. And the fact that he didn't turn himself in to the police immediately but instead tried to avoid being caught for the crime, I think, is something that the jury can well consider in determining what his penalty ought to be."

The court then declared that it would give the instruction. It stated: "I guess there is no other pidgeon [ *sic* ] hole to put that in other than consciousness of guilt. I don't dispute the proposition that is relevant to penalty. Consciousness of guilt may be [ *sic*] just isn't the best label to add on."

Subsequently, the court instructed the jury that "If you find that a defendant attempted to suppress evidence against himself in any manner, such as by an offer to compensate a witness, by destroying evidence, or by concealing evidence, such attempts may be considered by you as a circumstance tending to show a consciousness of guilt. However[,] such[ ] evidence is not sufficient in itself to prove guilt and its weight and significance, if any, are matters for your consideration."

***282** Defendant now contends that the court erred by instructing as it did. We agree.

It is error for a court to give an "abstract" instruction, i.e., "one which is correct in law but irrelevant[.]" (5 Witkin & Epstein, Cal.Criminal Law (2d ed. 1989) Trial, § 2950, p. 3624.) Plainly, the advisement here was legally sound. But as the court itself all but concluded, it was inapplicable. Its purpose is to offer the jury guidance in determining guilt. By the time it was delivered, the panel had already decided the question; it no longer needed assistance.[FN20] Contrary to the People's position here and below, the instruction did not adequately focus on the circumstances of the present offenses or any other issue material to penalty.

> FN20. It is true that at the penalty phase, the jury was required to determine whether defendant was "guilty" of certain "other crimes." But the record does not reveal any efforts to suppress evidence as to such offenses.

[50] We turn from the fact of error to its consequences. "[I]n most cases the giving of an abstract instruction is only a technical error which does not constitute ground for reversal." (5 Witkin & Epstein, Cal. Criminal Law, *supra,* Trial, § 2950, p. 3624.) This is such a case. The jurors here must have understood the instruction in accordance with the common meaning of its plain words, judged it to be mere surplusage, and passed over it without further thought. Certainly, they could not have been led to give undue weight to defendant's efforts to suppress evidence.

Against our conclusion, defendant claims that reversal is required. For argument's sake only, we shall assume the validity of his major premise—that an abstract instruction that misleads the jury may cause prejudice. But we cannot accept the soundness of his minor premise—that the instruction here may have actually misled the jurors. The argument is that the language in question might have been understood by the jury to allow consideration of "aggravating" circumstances beyond those permitted by the law. There is simply no reasonable likelihood of such a result. [ *People v. Clair, supra,* 2 Cal.4th at pp. 662–663, 7 Cal.Rptr.2d 564, 828 P.2d 705 [stating the "reasonable likelihood"

standard***406 **926 as the test for determining whether the jury misconstrued or misapplied an instruction].) The common meaning of the plain words stands in the way. Hence, there is no reasonable possibility that the error affected the outcome. (E.g., *People v. Ashmus* (1991) 54 Cal.3d 932, 965, 2 Cal.Rptr.2d 112, 820 P.2d 214 [stating the " reasonable possibility" standard as the test for assessing prejudice for state law error bearing on penalty in a capital case].) FN21

FN21. Defendant claims that by instructing as it did, the court committed error not only under California law, but also under the United States Constitution, including the cruel and unusual punishments clause of the Eighth Amendment and the due process clause of the Fourteenth Amendment. For the reasons stated above, we believe that the instruction did not substantially implicate any federal constitutional guaranty.

*283 E. *Constitutionality of the 1978 Death Penalty Law*

[51] Defendant contends that the 1978 death penalty law is facially invalid under the United States and California Constitutions, and hence that the judgment of death entered pursuant thereto is unsupported as a matter of law. "[A]s a general matter at least, the 1978 death penalty law is facially valid under the federal and state charters. In his argument here, defendant raises certain specific constitutional challenges. But ... in the ... series of cases [beginning with *People v. Rodriguez* (1986) 42 Cal.3d 730, 777–779, 230 Cal.Rptr. 667, 726 P.2d 113], we have rejected each and every one. We see no need to rehearse or revisit our holdings or their underlying reasoning." ( *People v. Ashmus, supra,* 54 Cal.3d at pp. 1009–1010, 2 Cal.Rptr.2d 112, 820 P.2d 214; accord, *People v. Clair, supra,* 2 Cal.4th at p. 691, 7 Cal.Rptr.2d 564, 828 P.2d 705.) FN22

FN22. We declare that "Whether or not expressly discussed, we have considered and rejected ... all of the assignments of error presented in all of defendant's briefs." ( *People v. Sully* (1991) 53 Cal.3d 1195, 1252, 283 Cal.Rptr. 144, 812 P.2d 163.)

Having reviewed the record in its entirety, we conclude that the jury found that defendant actually killed, *and* intended to kill, Marion R. within the meaning of *Enmund v. Florida, supra,* 458 U.S. 782, 788–801, 102 S.Ct. 3368, 3371–3379. We also conclude that these findings are amply supported and adopt them as our own. Accordingly, we hold that imposition of the penalty of death on defendant does not violate the Eighth Amendment to the United States Constitution. (See *Cabana v. Bullock* (1986) 474 U.S. 376, 386, 106 S.Ct. 689, 697, 88 L.Ed.2d 704.)

V. DISPOSITION

Having found no reversible error or other defect, we conclude that the judgment must be affirmed.

It is so ordered.

LUCAS, C.J., and PANELLI, KENNARD, ARABIAN, BAXTER and GEORGE, JJ., concur.

4 Cal.4th 238, 841 P.2d 897, 14 Cal.Rptr.2d 377

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re GUY KEVIN ROWLAND,

On Habeas Corpus.

No. _____

DECLARATION OF
HUGH W. RIDLEHUBER, M.D.

I, HUGH W. RIDLEHUBER, declare:

1. I am a resident of the State of California and am over the age of eighteen years. I am not a party to the above entitled action. If called as a witness, I could and would testify to the following.

2. I am a physician licensed to practice in the State of California, with a specialty in adult and child psychiatry. I received my medical degree at The Medical College of South Carolina and my psychiatric degrees from the University of North Carolina Medical School. I am in private practice in Belmont, California. I am board certified in psychiatry by the American Board of Psychiatry and Neurology (Certificate No. 10225). I have testified as an expert psychiatric witness in numerous criminal and civil cases. I was retained by Robert Courshon and Charles C. Pierpoint, the defense attorneys in People v. Rowland, Superior Court No. C-16709, and testified as an expert in the penalty phase of that trial in May, 1988.

3. Overall, I was contacted by defense counsel too late in the

proceedings to be able to prepare an adequate evaluation and analysis of Mr. Rowland's mental status and condition. In comparison with other criminal cases I have participated in, and especially in the context of a death penalty case, I was not given the proper amount of time or latitude to be of full assistance to the defense. If I had been able to perform the tests, evaluations and research, in the manner I have been able to do in other cases, I firmly believe that my testimony in the case would have been more effective and possibly more influential with the jury.

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4. My first contact with the defense occurred in February, 1988. I was retained because of previous work I had done in diagnosing and treating Attention Deficit Disorder (ADD) in children; moreover, I had been the testifying expert in the first cases to successfully use ADD as a defense in (non-capital) California criminal cases. Defense counsel had apparently been advised by George L. Wilkinson, M.D., and Alfred Fricke, Ph.D., that they suspected that Mr. Rowland did or had suffered from ADD. Consequently, I was asked to examine Mr. Rowland and review his medical history to make my own independent determination. However, the only analysis I was asked to make concerned whether Mr. Rowland currently exhibited symptoms of ADD, and therefore, that is all I tested for in my initial evaluation.

The first work I was able to do in the case was on February 25, 1988, when I met for one hour with defense counsel, and Drs. Wilkinson and Fricke, and Dr. Edmund Stone, who had treated Mr. Rowland and his mother in the 1960s. The meeting consisted primarily of a briefing by Dr. Stone of his treatment of the Rowlands and a review of the medical records from that period. Drs. Wilkinson and Fricke did not relate to me any conclusions or opinions about Mr. Rowland's mental status, either at present or at the time of the crime.

I first examined Mr. Rowland on March 4, 1988, and conducted a

four hour psychiatric interview. On March 18, 1988, I communicated to Mr. Pierpoint that based on the evaluation I had been able to perform that I could not substantiate that Mr. Rowland currently had a condition of ADD. I am informed, and on that basis believe, that jury selection before for the guilt phase of trial began on March 21, 1988, and that the evidentiary portion of the guilt phase began on April 28.

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My next communication with defense counsel was not until May 18, 1988, when I had a thirty minute telephone conversation with Mr. Courshon, who informed me that Mr. Rowland had been found guilty the previous Friday and would I be able to testify as to the effect of Mr. Rowland's traumatic childhood on his adult personality. On May 22, I had another phone call with Mr. Courshon, this time for fifty minutes. I am informed, and on that basis believe, that the penalty phase of the trial began on May 23, 1988. On May 23, I consulted with trial counsel and Dr. Wilkinson for about two hours. Also, between May 21 and May 30, 1988, I performed a more expansive, however still inadequate, evaluation of Mr. Rowland consisting of 14 hours of interview and nine hours of research, review and analysis. On May 31, I testified in court in the penalty phase.

Consequently, the total time I was able to spend with the defense attorneys in the Rowland case was only about 4 ½ hours; however, only about 2 ½ hours of that was spent just with the attorneys. It was my impression, however, that counsel had their defense strategy for the guilt phase planned before I was first contacted, but they seemed ill prepared in terms of the psychiatric defense they wished to present.

5. One example of the lack of preparation and the problem of not being consulted early enough, was the fact that I was not able to perform a more general examination of Mr. Rowland until after the guilt phase had concluded. In particular, on May 22, 1988, I conducted a test with Mr. Rowland

known as the Rogers Criminal Responsibility Assessment Scales (R-CRAS). I have used the R-CRAS test in other cases, and I believe it to be a reliable indicator of legal insanity at the time of the offense. After administering the test, my conclusion with regard to Mr. Rowland is that, under each of the legal definitions of insanity, he was legally insane at the time of the offense. If the test had been conducted prior to the beginning of trial, I would have advised defense counsel to seriously consider legal insanity as a defense during the guilt phase of the trial. I would have been prepared and willing to testify that in my expert opinion, Mr. Rowland was not criminally responsible for the death of the victim due to a condition of insanity at the time of the offense.

6. My conclusion concerning Mr. Rowland's psychiatric condition after full analysis was that he was a Borderline Personality Disorder, which is a serious mental disturbance, just short of psychosis. The diagnosis of Borderline Personality Disorder is fully compatible with the results of the R-CRAS test, because a person with such a diagnosis can often have the brief episodes of psychosis evidenced by the R-CRAS test. It is my opinion that I could have testified to at guilt phase that Mr. Rowland was either insane at the time of the offense or at least suffered from diminished capacity, and if the defense was unsuccessful I could have still testified about his Borderline Personality Disorder at the penalty phase. The two diagnosis are not at odds with one another.

7. I have been advised of additional information gathered during post conviction investigation which may have significantly altered my analysis of Mr. Rowland's psychiatric status had I been given the information at the time of trial. There is now information concerning the Rowland family's history of violence, alcoholism and sexual abuse going back several generations. The information reinforces the suspected existence of organic brain syndrome or other organic problem. The additional information would have caused me to advise that Mr. Rowland be given extensive tests to more conclusively

determine whether he suffered from an problem of organic origin. One such test I would have advised be administered is the "BEAM" test, which is sensitive to electro-chemical abnormalities that other tests do not reveal. The Attention Deficit Disorder which Mr. Rowland clearly had as a child is, in simple terms, an "electro-chemical problem" of both genetic and traumatic origin, and not a more visible "structural" abnormality found in organic brain disorder.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 8th day of September, 1993, at Belmont, California.

Hugh W. Ridlehuber

HUGH W. RIDLEHUBER, M.D.

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re GUY KEVIN ROWLAND,

On Habeas Corpus.

No. _____

SUPPLEMENTAL DECLARATION OF HUGH W. RIDLEHUBER, M.D.

I, HUGH W. RIDLEHUBER, declare:

1. I am a resident of the State of California and am over the age of eighteen years. I am not a party to the above entitled action. If called as a witness, I could and would testify to the following.

2. I am a physician licensed to practice in the State of California, with a specialty in adult and child psychiatry. I received my medical degree from the Medical University of South Carolina (Charleston) and my in internship, psychiatric residency and child/adolescent fellowship from the University of North Carolina Medical School (Chapel Hill). I am in

private practice in Belmont, California. I am board certified in psychiatry by the American Board of Psychiatry and Neurology (Certificate No. 10225). I have testified as an expert psychiatric witness in numerous criminal and civil cases. I was retained by Robert Courshon and Charles C. Pierpoint, the defense attorneys in People v. Rowland, San Mateo Superior Court No. C-16709, and testified as an expert in the penalty phase of that trial in May, 1988.

3. When I examined Guy Rowland in March and May of 1988, I did not conduct a full psychiatric evaluation. I saw him in a much more limited capacity, the parameters of which were set by the defense attorneys. They asked me to look for symptoms which indicated that Mr. Rowland presently (or at the time of the offense) suffered from Attention Deficit Hyperactivity Disorder (ADHD). The defense had used Alfred Fricke, Ph.D. (clinical psychologist), who did the general psychological evaluation, and George Wilkinson, M.D., who did a basic general psychiatric evaluation. It was my understanding that they did not believe that there was a psychiatric defense. However, because of Mr. Rowland's medical history of ADHD, and because they knew of my interest and expertise in ADHD, they decided to bring me in to evaluate that aspect of his mental functioning.

4. Further, the time constraints under which I was working made it virtually impossible to conduct anything other than the most general type of testing. Specifically, my first four hour examination in March, 1988,

was strictly limited to ADD testing, as that was what the attorneys had requested be done. My lengthier examination in May, 1988, was done while the penalty phase trial was already in progress, as I had been contacted by the defense attorneys to make a further evaluation only days before penalty phase began.

5. My evaluation was principally regarding whether he had Attention Deficit Hyperactivity Disorder, which could be used as part of his defense. My testing was primarily general screening and did not amount to even a broad neuropsychic evaluation. For example, the Short Category Test, which I used, is just a screening test. It does not allow for any measurement of frontal lobe damage, nor did I use any other test which did. The tests I used screened the motor strip and posterior brain areas. These tests are not able to measure significant, but subtle brain damage. Unfortunately, Mr. Rowland's evaluation suffered from the kind of time and pressure constraints that often times happen in criminal prosecutions. However, in my experience, the constraints in this case were far more extreme, and, consequently, had more debilitating results in the reliability of the diagnosis.

6. Another factor which reduced the range and effectiveness of my examination was the environment and conditions under which the evaluation was made. I saw Mr. Rowland in the county jail, which is, of course, a highly structured situation, and his wrists were shackled to his waist with chains. Also, he was facing, and later was in the middle of, a trial and

obviously a death sentence. When a subject is seen in the confined situation of a jail, where there is very set structure, with definite routines and under the influence of adrenaline release (which helps focus attention in attention disordered individuals) from the stress of a death sentence, and perhaps even the addition of some medication (which would significantly improve mental functioning), the subject is being evaluated at his absolute optimum performance. Thus, he is not seen in a naturalistic situation where his latent problems and symptoms would be manifested. And, without the kind of other data which has only recently been provided to me, the conclusions which are drawn from this type of jail evaluations can be seriously skewed and distorted.

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7. Another factor, briefly noted above, which effected my ability to evaluate Mr. Rowland was the fact that he was on certain medications at the time, and I was not aware of that fact until now. Mr. Rowland was on Mellaril, 15 mg. twice a day for anxiety, tremulousness, palpitations and, explosiveness. Mellaril is a powerful neuroleptic and antipsychotic medication. Such medication would affect my evaluation because I would not be seeing him in his natural state, but rather, under sedation. This would improve his mental functioning and mask the disturbances I would normally expect to see. Thus, it was really impossible for me to do a reliable evaluation under those circumstances.

8. Mr. Rowland was given a CAT scan just at the beginning of

the penalty phase trial. The test showed negative results, or no abnormalities. However, it should be noted that a CAT scan is best at showing pretty 52
significant, gross structural abnormalities. For example, it is useful for spotting a tumor, enlarged ventricals, hardening of the arteries or distinct abnormalities or deficits of that sort. However, a CAT scan cannot detect significant neuropsychiatric disorders and what we might call metabolic neurotransmitter functional disorders. For example, the test will not detect ADHD, which involves neurotransmitter dysfunction, or seizure disorders, and temporal lobe and frontal lobe dysfunctional problems. Those disorders could show up on tests which are able to measure metabolic functions like the PET Scan or SPECT Scan. However, in terms of this case, the CAT scan results on Mr. Rowland cannot be regarded as being particularly helpful because he appears to have significant problems arising from metabolic, neurotransmitter dysfunctions, which the CAT scan is not designed to detect.

9. I now know that there was a tremendous amount of information which would have been relevant to my analysis of Mr. Rowland that I was not aware of at time of the trial and of my evaluation of him. Based on the recent information I've reviewed, which includes medical records concerning head injuries, emergency room treatment for glue sniffing, and significantly more detailed accounts of childhood abuse, I do think there is very high probability of an organic brain condition that we were not aware of at the time of trial. Although, my limited evaluation of Mr. Rowland

at that time did not produce the test findings or the clinical observations necessary to make a diagnosis of organic brain dysfunction, that does not mean he did not have organicity. Based on the new information, I suspect that Mr. Rowland may have an organic brain condition which would be found in the frontal lobe area of the brain. I did not do any frontal lobe testing. As previously noted, my testing concentrated on the motor strip and posterior ⅔ of the brain. Typically, in those areas of the brain one finds gross abnormalities, however, the more subtle types of organicity that you would suspect here, are usually resident in the frontal lobe area. This area of the brain affects a person's capacity for judgment, reasoning, impulse control, capacity to project into the future, and problem solving abilities. Consequently, deficits or problems located in this area would have significant implications for behavior, especially in a case like Mr. Rowland's. 52

10. Psychiatric data now available shows that early abuse in childhood, either physical or sexual, can effect development of the brain and the neurotransmitter mechanisms of the brain. These are common precedents to developing frontal lobe deficits, and to developing multiple personality or also borderline personality disorders. Mr. Rowland's unstable functioning is a manifestation of, at least, unstable neurotransmitter mechanisms in the brain. When I saw him, Dr. Stone, the Kaiser doctor who had treated him as a youth, was of the opinion was that Mr. Rowland had ADD as a child and adolescent. However, the records I was able to review had no mention about

all this other history of blows to the head, glue sniffing, and near drownings. While there was some mention about childhood abuse, the actual magnitude of it was not so clearly defined. I was not aware of the pervasive quality of the childhood abuse in the Rowland family background.

11. The newly provided information I have reviewed certainly indicates the possibility of Mr. Rowland having a Bipolar Affective Disorder, which is a cyclical disorder which can only be diagnosed in between cycles of manic thought disorder and behavior by a careful and detailed history and it could have been masked in jail by Mellaril. My conclusion, to which I testified at trial, was that he suffered from a borderline personality disorder. It would appear now that, in fact, he has multiple or a group of disorders. It would have been necessary to for me to have Mr. Rowland undergo a much more comprehensive and structured diagnostic interview than I was able to conduct, in order to determine the possibility of a Bipolar Affective Disorder. With Bipolar Affective Disorder, a person becomes prone to psychosis and to criminal behavior during a manic phase, over which a person has very little control.

12. Another document I have reviewed, which I never saw before was a Medical History form for Mr. Rowland, filled out by his mother, Stella, when Guy was age 10. It should be noted that I was never actually given a copy of all of his medical records. I did look at some records, and made some notes, but I did not have the complete records nor the time to

pour through them as is necessary in a capital case. (Although it may look like I spent a lot of time, under these circumstances it was not nearly adequate for a reliable analysis in a death penalty case.) The medical history states that Mr. Rowland was born by caesarean section. Because she had had other children who were born by vaginal birth, it would strongly suggest that there was distress at his birth. A physician would not automatically do a caesarean birth unless the mother had other children born by caesarean. It appears then that in Mr. Rowland's case it was decided early that this child had to be delivered by caesarean. This means that there must have been fetal distress. The medical history form also notes that within the first 4 weeks of life, Mr. Rowland had jaundice, blood transfusion, convulsions, and an infection. If he was jaundiced, he probably would have received a transfusion, in order to protect the brain from developing icterus. Bilirubin is the colored pigment which causes jaundice and it is very toxic to the brain. High levels of bilirubin can cause cerebral palsy, brain damage, and retardation. So, the caesarean section and the jaundice with the blood infusion, forms a clinical picture of a child who probably had fetal distress syndrome.

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13. This set of birth complications could have caused organic brain problems in themselves. Moreover, a person can have ADHD type symptoms caused from brain damage and you can also get ADHD from Fetal Alcohol Syndrome (FAS). The fetal distress syndrome indicated by the medical

history form could have been caused by alcohol consumption by Mr. Rowland's mother.

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14. None of the information concerning the traumatic birth circumstances of Mr. Rowland's birth was known to me at the time of evaluation of him.

15. My evaluation of Mr. Rowland in March, 1988, lead me to believe that he did not have Attention Deficit Hyperactivity Disorder at that time. However, the additional information I've recently reviewed, and taking into account the circumstances surrounding my prior evaluation, I believe now that Mr. Rowland could quite possibly still be afflicted with Attention Deficit Hyperactivity Disorder, Adult Residual Form. Because he was in the obviously tension filled situation of facing a death penalty trial, almost certainly he would have had higher levels of adrenaline than would be the usual case. One of the things we notice about adults with ADHD is that they tend to procrastinate, they're like "cliffhangers," but, when faced with a real crisis, they begin to concentrate. So, what may have happened in my evaluation is that his underlying problems were not that obvious because of the acute circumstances facing him which caused him to be highly adrenalized. Adrenaline puts everything on "overdrive" and allows the mind to focus, and the one of the chief disabilities of ADHD is a severe lack of concentration. Thus, adrenaline acts like Ritalin, the medication used to overcome the dysfunction caused by ADHD. The new information I've reviewed also has

caused me to reevaluate my prior conclusion that Mr. Rowland did not have ADHD as an adult, because my examination of him took place in a highly structured setting in the jail, he was medicated, he was adrenalized which artificially improved his performance, I did not have a complete history, and I did not have the opportunity to interview family members who had observed his behavior over many years.



16. Based on the new evidence, Mr. Rowland should be tested different types of testing than I used. The brain problems strongly indicated here are very significant ones in terms of their effect on behavior and functioning, yet they are subtle in terms of detection. Mr. Rowland requires rather extensive neuropsychological testing to try to determine if there is frontal lobe dysfunction. I believe a BEAM scan should be used. The BEAM scan is a computer interpreted EEG. Also, a SPECT Scan should be conducted. What these more sophisticated tests could help us establish is whether there is frontal lobe damage which would impair judgment, reasoning, and impulse control. SPECT scans, or another test called a PET Scan, are able to measure metabolic functions in the brain, which is something that cannot be done by a CAT scan. The brain produces it's power of functioning by using a mixture of glucose and oxygen, much as an automobile uses gasoline and oxygen to produce power. If a person is afflicted with ADHD, rather than turning on when the brain confronts a concentration task, like they do normally, the neurotransmitters in the frontal lobes turn off. In fact, the harder an ADHD

person tries to pay attention, the worse his condition becomes. Thus, ADHD results from a kind of electrical activity problem. The PET and SPECT scans are able to see how various areas of the brain are operating (or activating) by measuring metabolic activity and glucose or oxygen consumption. In this case, PET or SPECT scans could have shown presence of functional metabolic disturbances in the brain and whether parts of the brain actually turn on when they are supposed to turn on, thereby locating and demonstrating brain deficiencies that are the cause of mental deficiencies.

17. In addition to the use of scanning machines, a more detailed and directed set of interviews and neuropsychological testing than I was able to conduct should be done.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 21ST day of January, 1994, at Belmont, California.

Hugh W. Ridlehuber

HUGH W. RIDLEHUBER, M.D.

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GUY KEVIN ROWLAND

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

GUY KEVIN ROWLAND,

Petitioner,

v.

ROBERT L. AYERS, Warden of the California State Prison at San Quentin,

Respondent.

No. C-94-03037-SBA

THIRD AMENDED PETITION FOR WRIT OF HABEAS CORPUS (CORRECTED)
DEATH PENALTY CASE

GUY KEVIN ROWLAND, through his attorneys Michael R. Levine and Joel Levine, hereby petitions this court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 and by this petition alleges as follows:

I

UNLAWFUL RESTRAINT

1. Petitioner is a prisoner in the State of California. He is unlawfully and unconstitutionally confined and restrained of his liberty by Arthur J. Calderon, Warden of the California State Prison at San Quentin, California, and by John N. Maddox, Acting Director

CLAIM II: TRIAL COUNSEL WAS INCOMPETENT FOR FAILING TO ADEQUATELY INVESTIGATE, PREPARE AND PRESENT MITIGATING PSYCHIATRIC EVIDENCE AT THE PENALTY PHASE TRIAL

72. Petitioner's death sentence was rendered unreliable because of the ineffective assistance of his defense counsel in preparing and presenting the penalty phase of his capital trial in violation of petitioner's federal constitutional rights as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. The violations resulted from counsels' failure to competently present petitioner's case in mitigation because of (a) the failure to identify the existence of frontal and temporal lobe brain dysfunction, and (b) the failure to competently prepare petitioner's psychiatric penalty phase presentation, including an inadequate investigation of petitioner's violent, abusive childhood and its continued detrimental effect on petitioner's mental health. Counsels' omissions were not reasonably competent. They knew or should have known the facts necessary to adequately prepare and present such mitigating evidence but nonetheless they failed to so. Absent such failure, it is reasonably probable that the penalty trial outcome would have been different. *Strickland v. Washington, supra.*

73. Petitioner's convictions and sentence of death and the affirmance of his convictions and sentence, given these circumstances, rest upon an unreasonable application of the law and an unreasonable determination of the facts and must be set aside.

74. Facts in support of this claim, among others to be presented after further briefing, adequate discovery, funding, psychiatric evaluation (including brain imaging studies), investigation, and access to this Court's subpoena power and other court processes, are as follows.

75. Dr. Hugh Ridlehuber, who evaluated petitioner in March of 1988 and then again in May of 1988, and who testified at petitioner's penalty phase trial did not conduct an adequate or competent assessment of petitioner's psychiatric and/or neurological condition

prior to the penalty phase trial. This occurred because trial counsel did not ask Dr. Ridlehuber to intervene in petitioner's case so as to provide a full evaluation of petitioner until a few days before the beginning of the penalty phase trial. As a result Dr Ridlehuber's ability to competently and adequately investigate petitioner's background, conduct appropriate testing and analysis of petitioner's mental and emotional condition, and confidently arrive at a diagnosis were severely curtailed.

76. For example, in March, 1988, when trial counsel asked Dr. Ridlehuber to test petitioner for the presence of ADHD, Dr. Ridlehuber was able to spend only four hours with petitioner and concluded, after that short period of time, that petitioner probably did not suffer from the disorder. Dr. Ridlehuber learned, after petitioner was convicted, that petitioner was being proscribed Mellaril twice a day at the time of this testing. Mellaril is a powerful, neuroleptic and antipsychotic medication which served to mask many of petitioner's disturbances and which improved petitioner's mental functioning. The March, 1988, diagnosis, therefore, was completely unreliable.

77. Neuropsychological testing conducted by Dr. Ridlehuber on petitioner post trial as part of petitioner's post conviction proceedings revealed that petitioner, in fact, has significant emotional, mental and attention disorder.

78. Similarly, it was not until May 27, 1988, four days after the beginning of the penalty phase trial, that trial counsel arranged for a CAT scan and sleep deprived EEG for petitioner. (CT: 791, 793-795.) That initial CAT scan did not show any indication of organic brain dysfunction or deficits. However, many brain dysfunctions arise from metabolic, neurotransmitter dysfunctions which the CAT scan is not able to detect. There was no time for any kind of additional testing prior to the penalty phase given that trial counsel did not even begin to address the question of obtaining appropriate testing for petitioner until after the penalty trial was already underway; well past the eleventh hour.

79. Since petitioner's penalty phase trial Dr. Ridlehuber has been able to obtain and

review a significant amount of additional information regarding petitioner's background, which was not made available to him prior to the penalty phase trial and which he did not have time to find for himself given the severe time limitations placed upon him by trial counsel. In Dr. Ridlehuber's opinion this information strongly suggests the likelihood that petitioner does suffer from some form of brain dysfunction.

80. That information includes medical records indicating that petitioner suffered several childhood head injuries, some with symptoms of concussion, including but not limited to episodes when he was five or six years old and was thrown into the air by his brother Britt and landed on his head. They also include a head injury sustained when he was fifteen years old and was thrown from a horse.

81. Dr. Ridlehuber has also learned since trial that petitioner has a history of irritability culminating in explosive behavior which is then followed by calm and fatigue. Throughout his life petitioner has experienced episodes of mental "spaciness" and confusion as well as periods of deep but nonspecific fear and panic. The panic states include feelings of horror accompanied by a sense of impending death and are part of a recurring feeling of terror which has haunted petitioner since his childhood.

82. Information has also been given to Dr. Ridlehuber, since the penalty phase trial, which indicates that Stella Rowland was homicidal towards her children on several occasions. She was known to have put Christine's head in the oven and then turned on the gas. She also tried to drown petitioner in the bath tub on more than the one occasion mentioned in the evidence at petitioner's penalty trial.

83. None of the foregoing information was available to Dr. Ridlehuber at the time of trial. All of it, in combination with the testing of petitioner which has taken place during post conviction proceedings, has lead Dr. Ridlehuber to conclude that petitioner suffers from a complex of disorders, including Bipolar Affective Disorder, Borderline Personality Disorder, and the aforementioned ADHD.

84. While Dr. Ridlehuber had concluded, at the time of his testimony at petitioner's penalty phase trial based, on the information known to him at that time, that petitioner did not suffer from any kind of organic brain disorder, the additional information he has received since trial, a portion of which has just been outlined above, has lead him to conclude that petitioner suffers from both frontal and temporal lobe dysfunctions; a diagnosis which was not made at the time of petitioner's trial, nor mentioned in the mitigating evidence because the background information and psychological testing necessary to adequately evaluate petitioner was simply not made available to Dr. Ridlehuber and/or was simply not done due to the very short period of time he was given in which to evaluate petitioner's condition.

85. Had the information been available, Dr. Ridlehuber would have testified at the guilt and/or penalty phase trial that petitioner suffered from a severe mental disease or defect at the time of the crimes charged such that it was highly probable that petitioner did not appreciate the nature or quality or consequences of his actions. The frontal lobe dysfunction interfered with the normal functioning of the brain in that area which controls inhibition, judgment and the ability to imagine consequences flowing from actions. The temporal lobe dysfunction, under conditions of emotional stress, would cause a "discharge" of brain activity representing itself as feelings of horror, "blackness" and terrifying fear and creating an altered and extremely frightening state of mind inconsistent with the requisite mental states necessary for petitioner to be found guilty of the charged murder, rape and rape special circumstance.

86. Dr. Ridlehuber would also have testified that petitioner's various conditions, when properly diagnosed constitute a treatable and controllable neuropsychiatric condition; evidence which would have constituted significant cause for the penalty phase jury to find mitigation in this case.

87. Trial counsel's inexcusable negligence in failing to bring a psychiatric expert into petitioner's case until literally a couple days before the onset of the penalty phase trial was incompetent standing on its own and it resulted in an unreliable and incorrect diagnosis of

petitioner's condition, all to petitioner's profound prejudice at the penalty phase trial. Petitioner was entitled, at a minimum to the assistance of a competent psychiatrist who could conduct an appropriate examination and evaluation of him. *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985). Trial counsel's incompetence deprived him of that right.

88. In fact, the fundamental lack of preparation of the defense testimony regarding petitioner's mental state and the inadequacy of the testing and analysis of petitioner by Dr. Ridlehuber was so obvious at the penalty phase trial that it became a center piece of the prosecution closing argument to the jury in which the prosecutor viciously attacked Dr. Ridlehuber as a person and as an expert and insinuated that he was a paid off defense charlatan. (See Claim XIII, infra, in which this aspect of the prosecution closing argument has been alleged as prosecutorial misconduct.)

89. The prosecutor told the jury, regarding Dr. Ridlehuber's first evaluation of petitioner in March, 1988, that Dr. Ridlehuber found no "objective" indications of disorder "[a]nd that's not something you can hide in a bunch of mumbo jumbo ... on each of the tests that tell something objective ... he doesn't find anything objective. That's March 4th, 1988." (RT 73: 7035.) He argued to the jury that Dr. Ridlehuber's testimony was inadequate and unreliable because Dr. Ridlehuber did not spend enough time to produce anything other than a poor diagnosis. He pointed out, regarding the March, 1988, testing that it was "totally unbelievable" that the doctor would not need to know the facts of the murder charged against petitioner in order to diagnose ADHD and its role in the crimes charged. (RT 73: 7033 7035.)[3]

90. The prosecutor then argued that:

> Remember when he does this full scale evaluation on May 21st and May 23RD. And then he testified that it took him about a week to review the documents and the history, and to arrive at a

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[3] Prior to the March tests defense counsel did not provide Dr. Ridlehuber with any information of any note regarding petitioner's case. They simply asked him to test petitioner to see if he suffered from ADHD. Ridlehuber spent only about four hours with petitioner for the March testing.

> diagnosis. And that was ... just last weekend, the weekend of May 28th, 1988. And Mr. Courshon was able to predict five days earlier, or more, on May 23rd, that he would find a different diagnosis. I would submit to you that such an opinion rushed together in a week you should give Dr. Ridlehuber's opinion the weight which it deserves. And you would be entitled to just totally reject everything he has told you.
> (RT 73:7038-7039.)

91. In sum, trial counsels' negligence, carelessness and incompetence in pulling Dr. Ridlehuber into the penalty phase case at the last minute resulted in sloppy, incorrect diagnostic work due to the time constraints placed on the expert and created the opportunity for the prosecutor to thoroughly discredit even that work. Given that the emotional and psychological damage petitioner sustained while growing up and its effect on his mental state in adulthood and, specifically, at the time of the offenses in this case was the major mitigating evidence presented in the penalty phase, counsels' failings were patently prejudicial under any standard and denied petitioner due process of law and a fair trial as well as his Sixth Amendment right to the effective assistance of counsel.

CLAIM XI: THE PROSECUTOR COMMITTED MISCONDUCT DURING HIS CLOSING ARGUMENTS IN THE PENALTY PHASE WHEN HE ARGUED HIS OWN PERSONAL BELIEF THAT THE DEATH PENALTY SHOULD BE IMPOSED IN PETITIONER'S CASE

213. Petitioner's sentence of death was imposed in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution because during his closing argument to the jury in the penalty phase the prosecutor committed misconduct when he expressed his personal belief that petitioner should be sentenced to die.[9] The judgment of conviction and sentence of death which was rendered and the affirmance of that judgment and sentence rest upon an unreasonable application of the law and an unreasonable determination of the facts, and must be set aside.

214. During the rebuttal portion of his closing arguments in the penalty phase trial the prosecutor made the following remarks to the jury:

> [I]'ve made a long practice in my life never to ask others to do what I would not feel is right, and what I would not do myself.
>
> I believe strongly in the sanctity of human life, and I would not ask you to do something that I would not do. And I believe in human life. But I also believe that society has the right, in fact the duty, to protect itself and to see that justice is done in the appropriate case.
> (RT 73:7047.)

215. Trial counsel objected to this argument on the grounds that the prosecutor, in making it, was injecting his personal opinions "in this matter concerning the sentence of death." The court was asked to admonish the jury to disregard the prosecutor's personal feelings about what the outcome of this case should be. The court overruled that objection on the grounds that the argument did not imply to the jury that the prosecutor knew something

[9] Pursuant to Judge Lynch's April 21, 1997 order [p. 8], in petitioner's state exhaustion petition this claim was presented as "Claim 9" and was alleged solely as a violation of the Fourteenth Amendment right to equal protection. It is asserted here as a violation of equal protection and all the above enumerated rights.

which the jury did not. so it was not misconduct.[10]

216. The argument constituted prejudicial misconduct. Its presentation denied petitioner his rights to due process and equal protection of the law by creating the distinct danger that the jury, having been apprised of the prosecutor's personal opinion of this case, would feel a lessened sense of their own responsibility in rendering a death verdict.

217. It is misconduct for a prosecutor to tell the jury his or her personal opinion about the strength of the state's evidence or the veracity of the state's witnesses. Likewise it is misconduct for a prosecutor to express his or her personal opinion as to the defendant's guilt. The reason for this rule is that the prosecutor enjoys an inherent credibility and prestige in the eyes of the jury, by virtue of his or her office, and the prosecutor's opinions may well carry undue weight with the jury.

218. The proscription against prosecutorial assertions of personal belief is not, however, concerned solely with statements that include, or might be construed as including, references to matters outside the record as the trial court erroneously concluded at petitioner's penalty phase trial. The evil of this particular kind of misconduct is that the prosecutor's opinion carries with it the imprimatur of the government and may induce the jury to trust the government's judgment rather than its own view of the evidence.

219. The misconduct in this instance reflects the dual evil, moreover, of including the prosecutor's instruction to the jury that society has the duty to protect itself and to see that justice is done in the appropriate cases. Clearly, the import of this comment, coming on the heels of the prosecutor's expression of his own personal opinion that petitioner's case was an "appropriate" case for the death penalty, was to essentially tell the jury that they would somehow be failing in their duty as members of society if they returned a verdict other than death. Such warnings have been historically viewed by the courts as among the most

[10] The same error and objection was raised in petitioner's motion for new trial filed after the penalty phase. (CT: 930.) It was again denied at that time. (RT 75:713 1.)

egregious forms of prosecutorial misconduct.

220. The prosecutor, as noted in one famous decision, "is the representative not of an ordinary part to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). Thus, the danger always exists, as recognized in Berger, that the average juror, to a greater or lesser degree, has confidence that the prosecutor will faithfully observe these obligations. Consequently, improper suggestions, insinuations and statements of personal belief are apt to carry much weight against the accused when stated by the prosecutor, when they should properly not carry any weight at all.

221. The misconduct was prejudicial to petitioner, violated his rights as enumerated here and requires reversal of the penalty phase verdict.

## CLAIM XII: THE PROSECUTOR IMPROPERLY' APPEALED TO THE PASSIONS AND PREJUDICES OF THE JURY AND MISLED THE JURORS AS TO THEIR PERSONAL RESPONSIBILITY IN DECIDING THE APPROPRIATE PENALTY IN THIS CASE BY MAKING REPEATED REFERENCES TO THE CALIFORNIA ELECTORATE'S ENACTMENT OF THE DEATH PENALTY LAWS AND THE RECENT OUSTER OF THREE CALIFORNIA SUPREME COURT JUSTICES

222. The sentence of death was imposed in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution because during the course of his closing argument the prosecutor repeatedly argued that the California electorate "overwhelmingly approved the death penalty" and reminded the jury, in the context of these arguments that "several" California Supreme Court justices, who did not enforce the death penalty "are gone now." The argument blatantly pandered to the passions and prejudices of the jury and, in the process, lessened the jurors' sense of their own personal responsibility for the sentencing choice they were going to make. The judgment of conviction and sentence which was rendered and the affirmance of that judgment and sentence rest upon an unreasonable application of the law and an unreasonable determination of the facts and must be set aside.

223. At the very beginning of this closing argument the prosecutor told the jury:

> We had a recent election in which several of our Supreme Court justices were perceived by the voters not to be applying this [death penalty] law. They are gone now. There's no question that it is the policy expressed by the willing of the populace that there be a death penalty in California, and that it be carried out in appropriate cases.
> (RT 73:6999; emphasis added.)

At the close of his argument, the prosecutor returned to this theme:

> And you know that if there is to be a death penalty in California, that when the voters overwhelmingly approved the death penalty, you know, as you sit there now, that that death penalty was designed for exactly this kind of man; ... That's why we have the death penalty. It was designed for the Guy Rowlands of the world. Yet you're going to hear about justice, and mercy, and sympathy.
> (RT 73:7043.)

Building on the theme that the death penalty was virtually mandated by the public, the prosecutor continued:

> The argument is not whether or not it's necessary that Guy Rowland should die for the crimes that he's committed, because there is a death penalty.
> (RT 73:7044.)

And finally:

> But it is necessary [to impose the death penalty] for another reason. It's necessary to uphold our system of justice; a system that the voters in the State of California have so overwhelmingly approved. That's why it's necessary, in this case, for the death penalty.
> (RT 73:7044-7045.)

224. Thereafter, in a statement which clearly reminded the jury of his previous comments about the ouster of three California Supreme Court justices for not applying the death penalty, the prosecutor added: "If the death penalty means anything in California, other than just empty words, it means it's justifiable, and appropriate, and warranted that he [petitioner] get it." (RT 73:7047.)[11]

225. These arguments constituted misconduct and render the death verdict ultimately returned by the jury unreliable under the Eighth Amendment.

226. The arguments, taken at face value, plainly appealed to the passions and prejudices of the jury by repeatedly reminding them that a verdict, other than a death verdict, might well be extremely unpopular with their fellow citizens. Clearly, the references to the fact that individuals as powerful as Supreme Court justices had been thrown out of office because they were perceived as failing to enforce the death penalty had to have had that precise import and effect in the minds of the jurors. The arguments also constituted a major theme of the prosecutor's penalty phase summation.

227. The arguments also improperly insinuated to the jurors that they did not

---

[11] Defense counsel did not object to any of these arguments, but at the beginning of the defense closing argument characterized the prosecutor's comments as "somewhat off line." (RT 73:7051-7052.)

individually carry the entire responsibility for the penalty phase decision they were about to make in this case and, in that sense, unconstitutionally shifted that responsibility, in whole or part, from the jurors' shoulders where the Eighth Amendment demands that it be carried, to the electorate of the State of California and to the reification of the fact that the electorate "overwhelmingly" demanded enforcement of the death penalty.

228. Capital sentencing jurors must believe that "the truly awesome" responsibility for decreeing death is theirs and theirs alone. Arguments, such as that made in this case, which suggest that even a part of that burden can be shifted onto another entity undermine the strict standards of reliability that the Eighth Amendment requires.

229. Petitioner's trial counsel did not object to these arguments nor seek a jury admonition. In failing to do so counsel did not provide petitioner with the effective assistance of counsel at trial as required by the Fifth, Sixth and Fourteenth Amendments. The arguments were improper and a timely objection would have been sustained by the court. There was also no reasonable or credible tactical basis for failing to object. In fact, defense counsel began his own opening arguments by attempting to tell the jury that the prosecutor's statements were "off-line." A timely objection and admonition from the court might have cured the error and the damage from the error. Defense counsel's arguments, which could clearly be seen by the jury, not as proof that the prosecutor was, in fact, "off-line" but merely as defense argument and rhetoric did nothing to cure the error or to ameliorate the damaging impact of the prosecutor's arguments on the jurors assessments of their own sentencing responsibilities in this case.

230. The misconduct undermined the reliability of the penalty phase verdict and requires reversal of that verdict.

OFFICE OF THE CLERK
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CHARD W. WIEKING
CLERK

450 GOLDEN GATE AVENUE
SAN FRANCISCO, CA 94102
(415) 556-3031

March 12, 1990

**MEMORANDUM**

**TO:** Book Holders of Local Rules and General Orders

**FROM:** Rich Wieking RW

**SUBJECT:** New Local Rule 296

Attached is a copy of new Local Rule 296. The substance of Local Rule 296 was formerly contained in General Order No. 30. General Order No. 30 is now eliminated.
(ABROGATED)



Attachment

## RULE 296

## CAPITAL HABEAS CORPUS PETITIONS

**296-1. Applicability.**

This Rule shall govern the procedures for a first petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 in which petitioner seeks relief from a judgment imposing a penalty of death. A subsequent filing may be deemed a first petition under this Rule if the original filing was not dismissed on the merits. This Rule is intended to supplement the Rules Governing § 2254 Cases and is not intended to alter or amend those rules. The application of this Rule to a particular petition may be modified by the judge to whom the petition is assigned.

**296-2. Notices from California Attorney General.**

The California Attorney General shall send to the Clerk of this Court (a) prompt notice whenever the California Supreme Court affirms a sentence of death; (b) at least once a month, a list of scheduled executions; and, (c) at least once a month, a list of death penalty appeals pending before the California Supreme Court.

**296-3. Notice from Petitioner's Counsel.**

Whenever counsel determines that a petition will be

filed in this Court, he or she shall promptly file with the Clerk of this Court and send to the California Attorney General a written notice of intention to file a petition. The notice shall state the name of the petitioner, the district in which petitioner was convicted, the place of petitioner's incarceration, and the status of petitioner's state court proceedings. The notice is for the information of the court only, and failure to file the notice shall not preclude the filing of the petition.

**296-4. Counsel.**

**(a) Appointment of Counsel.** Each petitioner shall be represented by counsel unless petitioner has clearly elected to proceed pro se and the court is satisfied, after hearing, that petitioner's election is intelligent and voluntary.

Unless petitioner is represented by retained counsel, counsel shall be appointed in every such case at the earliest practicable time. A panel of attorneys qualified for appointment in death penalty cases will be certified by a selection board appointed by the Chief Judge of the district. This board will consist of a federal defender, a member of the California Appellate Project (CAP), a member of the state bar, and a representative of the state public defender.

When a death judgment is affirmed by the California

Supreme Court and any subsequent proceedings in the state courts have been concluded, CAP will forward to the selection board the name of state appellate counsel and, if counsel is willing to continue representation in the federal habeas corpus proceedings, CAP's evaluation of counsel's performance in the state courts and recommendation of whether that counsel should be appointed in federal court.

If state appellate counsel is available to continue representation in the federal court, and if he or she is deemed qualified to do so by the selection board, there is a presumption in favor of continued representation except where state appellate counsel was also counsel at trial.

In light of this presumption, it is expected that appointed counsel who is willing to continue representation and who has been certified by the selection board as qualified to do so would ordinarily file a motion for appointment of counsel on behalf of his or her client together with the client's federal habeas corpus petition. If, however, counsel for any reason wishes to confirm his or her appointment before preparing the petition, counsel may move for appointment before filing the petition.

If state appellate counsel is not available to represent petitioner in the federal habeas corpus proceedings, or if appointment of state appellate counsel would be inappropriate for any reason, the court shall appoint counsel upon application of petitioner. The Clerk

of the Court shall have available forms for such application. A model form for such application is annexed to this Rule. Counsel shall be appointed from the panel of qualified attorneys certified by the selection board. Either CAP or the selection board may suggest one or more counsel for appointment. The court may also request suggestions from CAP or the selection board for one or more counsel. If application for appointment of counsel is made before a finalized petition has been filed, the application shall be assigned to a district judge in the same manner that a finalized petition would be assigned, and counsel shall be appointed by the assigned judge. The judge so assigned shall continue to preside over the proceedings through their conclusion.

The presumptive rate for compensation of appointed counsel under 21 U.S.C. § 848(q)(10) shall be $150.00 per hour.

**(b) Second Counsel.** Appointment and compensation of second counsel shall be governed by § 2.11 of Volume VII of the Guide to Judiciary Policies and Procedures, Appointment of Counsel in Criminal Cases, and by 21 U.S.C. § 848(q).

**296-5. Filing.**

Petitions as to which venue lies in this district shall be filed in San Francisco.

As used herein, the term "finalized petition" shall refer to the petition filed by retained or appointed counsel or by a petitioner who has expressly waived counsel and elected to proceed pro se under paragraph 296-4 of this Rule. Finalized petitions shall be filed on a form supplied by the Clerk of the Court, and shall be filled in by printing or typewriting. In the alternative, the finalized petition may be in a legible typewritten or written form which contains all of the information required by that form. All finalized petitions (a) shall state whether petitioner has previously sought relief arising out of the same matter from this court or any other federal court, together with the ruling and reasons of such court, and (b) shall set forth any scheduled execution date.

An original and three copies of the finalized petition shall be filed by counsel for the petitioner. A pro se petitioner need only file the original. No filing fee is required.

The Clerk of the Court will immediately notify the California Attorney General's office when a petition is filed.

When a petition is filed by a petitioner who was convicted outside this district, the Clerk of the Court will immediately advise the Clerk of the Court of the district in which the petitioner was convicted.

**296-6. Assignment to Judges.**

Notwithstanding the general assignment plan of this court, petitions shall be assigned to judges of the court as follows:

(a) The Clerk of the Court shall establish a separate category for these petitions, to be designated with the title "Capital Case."

(b) All active judges of this court shall participate in the assignments without regard to intradistrict venue.

(c) Petitions in the Capital Case category shall be assigned blindly and randomly by the Clerk of the Court to each of the active judges of the court.

(d) If the assigned judge has filed a Certificate of Unavailability with the Clerk of the Court which is in effect on the date of the assignment, a new random assignment will be made to another judge immediately.

(e) If the petitioner has previously sought relief in this court with respect to the same conviction, the petition will be assigned to the judge, if he or she is still sitting, who was assigned to the prior proceeding unless such judge has taken senior status and has elected not to hear capital habeas corpus petitions.

(f) Pursuant to 28 U.S.C. § 636(b)(1)(B), and not inconsistent with law, United States Magistrates may be designated by the court to perform all duties under this

Rule, including evidentiary hearings.

**296-7. Transfer of Venue.**

Subject to the provisions of 28 U.S.C. § 2241(d), it is the policy of this court that a petition should be heard in the district in which the petitioner was convicted, rather than in the district of petitioner's present confinement.

If an order for the transfer of venue is made, the judge will order a stay of execution which shall continue until such time as the transferee court acts upon the petition or the order of stay. The issuance of a stay in the transferee court shall be determined under paragraph 8 of this Rule.

**296-8. Stays of Execution.**

**(a) Stay Pending Final Disposition.** Upon the filing of a petition, unless the petition is patently frivolous, the judge will order a stay of execution pending final disposition of the petition in this court.

**(b) Temporary Stay for Appointment of Counsel.** Where counsel in the state court proceedings withdraws at the conclusion of the state court proceedings or is otherwise not available or qualified to proceed, the selection board will designate an attorney from the panel who will assist an indigent petitioner in filing pro se applications for

appointment of counsel and for temporary stay of execution. This application shall be substantially in the form annexed hereto and shall be deemed to be a petition for writ of habeas corpus with leave having been granted to amend the petition upon appointment of counsel. Upon the filing of this application, the district court shall issue a temporary stay of execution and appoint counsel from the panel of attorneys certified for appointment. The temporary stay will remain in effect for forty-five (45) days unless extended by the court.

(c) **Temporary Stay for Preparation of the Petition.** Where counsel new to the case is appointed, upon counsel's application for a temporary stay of execution accompanied by a specification of nonfrivolous issues to be raised in the petition, the district court shall issue a temporary stay of execution unless no nonfrivolous issues are presented. If no filing was made under paragraph 8(b) above, the specification of nonfrivolous issues required under this paragraph shall be deemed to be a petition for writ of habeas corpus with leave having been granted to amend the petition. The temporary stay will remain in effect for one hundred twenty (120) days to allow newly appointed counsel to prepare and file the finalized petition. The temporary stay may be extended by the court upon a subsequent showing of good cause.

(d) **Temporary Stay for Transfer of Venue.** See

paragraph 296-7.

**(e) Temporary Stay for Unexhausted Claims.** If the petition indicates that there are unexhausted claims for which a state court remedy is still available, petitioner will be granted a sixty (60) day stay of execution in which to seek a further stay from the state court in order to litigate the unexhausted claims in state court. During the proceedings in state court, the proceedings on the petition will be stayed. After state court proceedings have been completed, petitioner may amend the petition with respect to the newly exhausted claims.

**(f) Stay Pending Appeal.** If the petition is denied and a certificate of probable cause for appeal is issued, the court will grant a stay of execution which will continue in effect until the Court of Appeals acts upon the appeal or the order of stay.

**(g) Notice of Stay.** Upon the granting of any stay of execution, the Clerk of the Court will immediately notify the warden of San Quentin Prison and the California Attorney General. The California Attorney General shall ensure that the Clerk of the Court has a twenty-four hour telephone number to the warden.

**296-9. Procedures for Considering the Petition.**

Unless the judge summarily dismisses the petition under Rule 4 of the Rules Governing § 2254 Cases, the

following schedule and procedure shall apply subject to modification by the judge. Requests for enlargement of any time period in this Rule shall comply with the applicable local rules of the court.

(1) Respondent shall as soon as practicable, but in any event on or before twenty (20) days from the date of service of the finalized petition, lodge with the court the following:

(a) Transcripts of the state trial court proceedings;

(b) Appellant's and respondent's briefs on direct appeal to the California Supreme Court, and the opinion or orders of that court;

(c) Petitioner's and respondent's briefs in any state court habeas corpus proceedings, and all opinions, orders and transcripts of such proceedings;

(d) Copies of all pleadings, opinions and orders in any previous federal habeas corpus proceeding filed by petitioner, or on petitioner's behalf, which arose from the same conviction.

(e) An index of all materials described in items (a) through (d) above. Such materials are to be marked and numbered so that they can be uniformly cited. Respondent shall serve this index upon counsel for petitioner.

If any items identified in paragraphs (a) through (d) above are not available, respondent shall state when, if

at all, such missing material can be lodged.

(2) If counsel for petitioner claims that respondent has not complied with the requirements of paragraph (1), or if counsel for petitioner does not have copies of all the documents lodged with the court by respondent, counsel for petitioner shall immediately notify the court in writing, with a copy to respondent. Copies of the missing documents will be provided to counsel for petitioner by the court.

(3) Respondent shall file an answer to the petition with accompanying points and authorities within thirty (30) days from the service of the finalized petition. Respondent shall include in the answer the matters defined in Rule 5 of the Rules Governing § 2254 Cases and shall attach any other relevant documents not already filed or lodged.

(4) Within thirty (30) days after respondent has filed the answer, petitioner may file a traverse.

(5) No discovery shall be had without leave of the court.

(6) A request for an evidentiary hearing by either party shall be made within fifteen (15) days from the filing of the traverse, or within fifteen (15) days from the expiration of the time for filing the traverse. The request shall include a specification of which factual issues require a hearing and a summary of what evidence the party proposes to offer. An opposition to the request for an evidentiary

hearing shall be made within fifteen (15) days from the filing of the request. The court will then give due consideration to whether an evidentiary hearing will be held.

**296-10. Evidentiary Hearing.**

If an evidentiary hearing is held, the court will order the preparation of a transcript of the hearing, which is to be immediately provided to petitioner and respondent for use in briefing and argument. Upon the preparation of the transcript, the court may establish a reasonable schedule for further briefing and argument of the issues considered at the hearing.

**296-11. Oral Argument.**

Except in cases where the petition is patently frivolous, if no evidentiary hearing is held, the court, at its discretion, may set the matter down for oral argument within ninety (90) days after the time to request an evidentiary hearing has passed or within ninety (90) days after the court has denied a request for an evidentiary hearing.

**296-12. Rulings.**

The court's rulings may be in the form of a written opinion which will be filed, or in the form of an oral opinion on the record in open court, which will be promptly

transcribed and filed.

The Clerk of the Court will immediately notify the warden of San Quentin Prison and the California Attorney General whenever relief is granted on a petition.

The Clerk of the Court will immediately notify the clerk of the United States Court of Appeals for the Ninth Circuit by telephone of (i) the issuance of a final order denying or dismissing a petition without a certificate of probable cause, or (ii) the denial of a stay of execution.

When a notice of appeal is filed, the Clerk of the Court will transmit the available records to the Court of Appeals immediately.

STATE WANT.

WE HAD A RECENT ELECTION IN WHICH SEVERAL OF OUR SUPREME COURT JUSTICES WERE PERCEIVED BY THE VOTERS NOT TO BE APPLYING THIS LAW. THEY ARE GONE NOW. THERE'S NO QUESTION THAT IT IS THE POLICY EXPRESSED BY THE WILL OF THE POPULACE THAT THERE BE A DEATH PENALTY IN CALIFORNIA, AND THAT IT BE CARRIED OUT IN APPROPRIATE CASES.

IN OUR SYSTEM OF JUSTICE THE PENALTY SHOULD FIT THE CRIME AND THE CRIMINAL. MINOR CRIMES, LITTERING, THINGS LIKE THAT, WE FINE PEOPLE, WE MAKE THEM PAY SOME MONEY. WE DON'T GIVE SERIOUS PENALTIES FOR THAT.

NOT ALL MURDER IS QUALIFIED FOR THE DEATH PENALTY, AS YOU KNOW. THERE MUST BE A SPECIAL CIRCUMSTANCE, A SPECIAL THING THAT THE VOTERS FOUND THAT IF YOU COMMIT A MURDER AND YOU ALSO DO ONE OF THESE SPECIAL CIRCUMSTANCES -- IN THIS CASE IT'S RAPE -- THAT YOU QUALIFY FOR THE DEATH PENALTY.

BUT NOT ALL PEOPLE THAT QUALIFY FOR THE DEATH PENALTY SHOULD GET THE DEATH PENALTY. IT'S ONLY THOSE PEOPLE LIKE MR. ROWLAND, THAT THE BAD OUTWEIGHS THE GOOD IN HIS BACKGROUND, AND SO SUBSTANTIALLY OUTWEIGHS THE GOOD OR THE MITIGATION IN HIS BACKGROUND, THAT DEATH IS JUSTIFIED, DEATH IS APPROPRIATE, DEATH IS WARRANTED.

I WOULD SUBMIT TO YOU THAT AFTER HEARING THE MANNER IN WHICH GERI RICHARDSON DIED, THE BRUTALITY, THE HORROR, THE DEGRADATION, AND THE EXTREME VIOLENCE IN THAT RAPE, THAT IT

THEN AFTER THE DEFENDANT IS CONVICTED OF MURDER HE GETS CONTACTED AGAIN, APPARENTLY. "WELL LET'S DO A FULL EVALUATION." FOR WHAT? SO THAT WE CAN HAVE SOME PSYCHIATRIC TESTIMONY IN THE CASE, APPARENTLY.

AND I GUESS WHEN YOU HIRE A PSYCHIATRIST YOU GET SOMETHING OUT OF IT. APPARENTLY HE WAS HIRED TO SEE IF THERE WAS SOMETHING ELSE HE COULD FIND TO EXPLAIN THIS BEHAVIOR. AND HE FOUND IT.

AND TO SHOW YOU JUST HOW PREDICTABLE IT IS WHEN YOU HIRE A PSYCHIATRIST THAT HE'S LIKELY TO FIND SOMETHING, MR. COURSHON WAS ABLE TO PREDICT ON MAY 23RD, IN HIS OPENING STATEMENT, AND HE NAMES THEM BY NAME, "AND THE EXPERTS IN OUR CASE, AT LEAST ONE OF THEM ..." IT'S SPELLED DREW RIDLEHUBER. I SUPPOSE THEY MEANT HUGH RIDLEHUBER "... IS GOING TO INDICATE THAT IN HIS OPINION HE THINKS THEY ALWAYS MISDIAGNOSED GUY ROWLAND."

REMEMBER WHEN HE DOES THIS FULL SCALE EVALUATION WAS ON MAY 21ST AND MAY 22ND. AND THEN HE TESTIFIED THAT IT TOOK HIM ABOUT A WEEK TO REVIEW THE DOCUMENTS AND THE HISTORY, AND TO ARRIVE AT A DIAGNOSIS. AND THAT WAS ON THE WEEKEND, JUST LAST WEEKEND, THE WEEKEND OF MAY 28TH, 1988.

AND MR. COURSHON WAS ABLE TO PREDICT FIVE DAYS EARLIER, OR MORE, ON MAY 23RD, THAT HE WOULD FIND A DIFFERENT DIAGNOSIS.

I WOULD SUBMIT TO YOU THAT SUCH AN OPINION RUSHED

TOGETHER IN A WEEK, YOU SHOULD GIVE DR. RIDLEHUBER'S OPINION THE WEIGHT WHICH IT DESERVES. AND YOU WOULD BE ENTITLED TO JUST TOTALLY REJECT EVERYTHING HE HAS TOLD YOU.

NOW, LET'S SUMMARIZE SOME THINGS NOW. THE DEFENDANT WAS NICE TO SOMEONE IN THE WEEKS BETWEEN THE RAPING OF VILLARREAL AND VANCE. THAT'S A GOOD THING IN HIS BACKGROUND. HE WAS POLITE TO THE LADY UP IN THE JAIL.

BUT LET'S LOOK AT SOME OTHER THINGS. NOW THESE ARE NOT AGGRAVATING FACTORS. YOU CAN ONLY CONSIDER A, B, AND C. THESE ARE THINGS THAT WERE PRESENTED TO YOU EITHER IN CROSS-EXAMINATION OR IN REBUTTAL TO POINT OUT TO YOU SOME FACTORS IN THE DEFENDANT'S BACKGROUND THAT YOU SHOULDN'T DOD IN AGGRAVATION, BUT YOU SHOULD USE TO CONSIDER WHETHER OR NOT YOU WANT TO FIND ANY OF THE MITIGATING THINGS IN K.

HE GETS A THERAPIST IN PRISON. AND THE THERAPIST BELIEVES THAT HE'S WORKING HARD; AND THAT GUY ROWLAND UNDERSTANDS RIGHT FROM WRONG; THAT HE'S CAPABLE OF MAKING CHOICES IN HIS LIFE; THAT HE UNDERSTANDS THAT ALCOHOL IS A PROBLEM FOR HIM, AND IF HE USES IT HE'S AT RISK; AND THAT HE UNDERSTANDS THAT HIS ANGER TOWARD OLDER WOMEN, MOTHER FIGURES, ARE A PROBLEM IN HIS LIFE; AND THAT HE'S AT RISK IF HE DOES THOSE THINGS.

NOW, HOW SERIOUSLY DID GUY ROWLAND TAKE THAT ADVICE? HE SAID HE UNDERSTOOD IT, ACCORDING TO THE PSYCHOLOGIST. HOW SERIOUSLY DID HE TAKE IT?

PRISON; THAT HE WON'T BE A THREAT TO ANYONE IN PRISON.

THEY ARE GOING TO TELL YOU THAT HE KNOWS SOMETHING BY YOUR VERDICT THAT NONE OF US KNOW, HE KNOWS WHERE HE WILL DIE; HE WILL DIE IN PRISON. WHETHER YOU GIVE HIM THE DEATH PENALTY OR LIFE WITHOUT PAROLE, HE KNOWS THAT HE WILL DIE IN PRISON, AND THAT THAT ALONE IS ENOUGH PUNISHMENT.

AND AS LONG AS THEY ARE VERY CAREFUL IN PRISON AND TAKE ADEQUATE PRECAUTIONS WITH HIM, I DOUBT THAT HE'LL EVER HURT ANYONE AGAIN. HE MIGHT, BUT THERE'S NO WAY OF PREDICTING THAT. HE PROBABLY WON'T ESCAPE. HE MIGHT, BUT THERE'S NO WAY OF PREDICTING THAT.

THE ARGUMENT IS NOT WHETHER OR NOT IT'S NECESSARY THAT GUY ROWLAND SHOULD DIE FOR THE CRIMES THAT HE'S COMMITTED, BECAUSE THERE IS A DEATH PENALTY.

AND THAT ARGUMENT THAT IT'S NOT NECESSARY, THAT THERE IS A LESSER ALTERNATIVE, COULD BE APPLIED TO ANY CONVICTED MURDERER. IT'S NOT NECESSARY TO IMPOSE THE DEATH PENALTY ON ANY MURDERER, NO MATTER HOW HORRIBLE HE IS OR NO MATTER HOW HORRIBLE THE CRIME, BECAUSE THE PRISON SYSTEM CAN ALWAYS DEAL WITH YOU. NO MATTER HOW HORRIBLE YOU ARE, THEY CAN ALWAYS FIND A MORE RESPECTIVE PLACE TO PUT YOU. AND IT'S NOT NECESSARY TO IMPOSE THE DEATH PENALTY, FOR THAT REASON.

BUT IT IS NECESSARY FOR ANOTHER REASON. IT'S NECESSARY TO UPHOLD OUR SYSTEM OF JUSTICE; A SYSTEM THAT THE VOTERS IN THE STATE OF CALIFORNIA HAVE SO OVERWHELMINGLY

APPROVED. THAT'S WHY IT'S NECESSARY, IN THIS CASE, FOR THE DEATH PENALTY.

AND MERCY IS ANOTHER THEME YOU'RE GOING TO HEAR. AND YOU'RE GOING TO BE INSTRUCTED THAT YOU CAN CONSIDER MERCY.

AS YOU'RE THINKING ABOUT MERCY FOR GUY ROWLAND, I WANT TO GIVE YOU THE COUNTER THING THAT I THINK YOU SHOULD BE THINKING ABOUT.

THINK ABOUT THE MERCY THAT THIS MAN GRANTED TO MARION GERALDINE RICHARDSON. THINK ABOUT THE NUMBER OF BLOWS IT TOOK TO HER FACE TO GET IT TO LOOK THAT WAY. THINK ABOUT THE NUMBER OF BRUISES ON HER BODY, THE FUTILE ATTEMPTS THAT SHE PUT HER ARM UP TO PROTECT HERSELF FROM THIS VICIOUS HUMAN BEING. AND THINK ABOUT MERCY FOR GUY ROWLAND.

I WANT TO READ YOU A BRIEF PARAGRAPH FROM THE BOOK CALLED, "THE KILLING OF BONNIE GARLAND." IT'S A CASE THAT OCCURRED BACK IN NEW YORK, ALBANY. A MAN NAMED WILLARD GATLAND, A PSYCHIATRIST, WROTE A BOOK ABOUT IT. IN THE PROLOGUE HE MAKES AN INTERESTING OBSERVATION. I'D LIKE TO POINT THAT OUT TO YOU.

"WHEN ONE PERSON KILLS ANOTHER, THERE IS AN IMMEDIATE REVULSION AT THE NATURE OF THE CRIME. BUT IN A TIME SO SHORT AS TO SEEM INDESCENT TO THE MEMBERS OF THE PERSONAL FAMILY, THE DEAD PERSON CEASES TO EXIST AS AN IDENTIFIABLE FIGURE.

"TO THOSE INDIVIDUALS IN THE COMMUNITY OF GOODWILL AND EMPATHY, WARMTH AND COMPASSION, ONLY ONE OF THE KEY ACTORS IN

BE HELD ACCOUNTABLE. JUSTICE REQUIRES THAT HE RECEIVE THE PENALTY THAT HE DESERVES; THE JUSTIFIABLE AND THE APPROPRIATE PENALTY.

IF THE DEATH PENALTY MEANS ANYTHING IN CALIFORNIA, OTHER THAN JUST EMPTY WORDS, IT MEANS THAT IT'S JUSTIFIABLE, AND APPROPRIATE. AND WARRANTED THAT HE GET IT.

I'M SURE THAT YOU, JUST AS I HAVE OVER THE PAST SEVERAL MONTHS OR WEEKS, HAVE GIVEN SERIOUS THOUGHT TO THE DEATH PENALTY LAW AND ITS POTENTIAL APPLICATION TO THIS MAN.

AND, AS MANY OF THE JURORS TOLD US, IT'S ONE THING TO BE PART -- IT'S ONE THING TO VOTE AND SAY, "I'M IN FAVOR OF THE DEATH PENALTY." AND, AS YOU KNOW AND ARE FEELING VERY HEAVILY AT THIS POINT, I'M SURE, IT'S ANOTHER THING ALL TOGETHER TO BE PART OF THE JUDICIAL PROCESS THAT ACTUALLY WILL RESULT IN IT.

AND I FEEL FOR YOU. BUT WE'RE ALL PART OF IT; I AM. YOU ARE. AND I'VE MADE A LONG PRACTICE IN MY LIFE NEVER TO ASK OTHERS TO DO WHAT I WOULD NOT FEEL IS RIGHT, AND WHAT I WOULD NOT DO MYSELF.

I BELIEVE STRONGLY IN THE SANCTITY OF HUMAN LIFE, AND I WOULD NOT ASK YOU TO DO SOMETHING THAT I WOULD NOT DO. AND I BELIEVE IN HUMAN LIFE. BUT I ALSO BELIEVE THAT SOCIETY HAS THE RIGHT, IN FACT THE DUTY, TO PROTECT ITSELF AND TO SEE THAT JUSTICE IS DONE IN THE APPROPRIATE CASES.

AND BASED ON THE SYSTEM OF JUSTICE WHERE THE

PUNISHMENT SHOULD FIT THE CRIME AND THE CRIMINAL, BASED ON THE LAW IN THIS CASE AS I'VE EXPLAINED IT AND AS THE JUDGE WILL EXPLAIN IT TO YOU FURTHER, BASED ON THE SAVAGERY, AND THE BRUTALITY, AND THE HORROR OF THE CRIME AGAINST MARION GERALDINE RICHARDSON, BASED ON HIS HISTORY OF PAST CRIMINAL ACTIVITY INVOLVING VIOLENCE WHICH REPRESENTS A MAN OF EXTREME CRUELTY, DEPRAVITY, AND VIOLENCE, I NOW STAND BEFORE YOU, AND WITH A FULL REALIZATION OF THE AWESOME RESPONSIBILITY THAT'S BEEN ENTRUSTED TO YOU AND TO ME, AND WITH A FULL REALIZATION OF THE GRAVITY AND THE ENORMITY OF WHAT I AM ABOUT TO ASK YOU, WITHOUT RESERVATION, WITHOUT HESITATION, I AM ASKING THAT YOU RETURN A VERDICT OF DEATH.

THE COURT: THANK YOU, MR. MURRAY.

COUNSEL, WOULD YOU APPROACH THE BENCH FOR A MOMENT, SO WE CAN DISCUSS SCHEDULING.

(SIDE BAR CONFERENCE HELD BY THE COURT, MR. MURRAY AND MR. COURSHON, NOT REPORTED.)

THE COURT: LADIES AND GENTLEMEN, WE'LL TAKE A 15 MINUTE RECESS NOW, AND THEN WE WILL RETURN FOR THE DEFENSE ARGUMENT.

JUST FOR YOUR PLANNING PURPOSES, WE WILL NOT BE TAKING THE LUNCH HOUR AT THE USUAL TIME TODAY. I WANT TO COMPLETE THE ARGUMENTS IN A GROUP, BEFORE WE TAKE A LONG LUNCH RECESS. SO WE WILL TAKE 15 MINUTES NOW.

REMEMBER THE ADMONITION YOU'VE HEARD SO OFTEN. PUT

Guy K. Rowland
P.O. Box C-35496
San Quentin, California 94974

C94 3037 SBA

JW

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Case 94 20650

GUY KEVIN ROWLAND,

Petitioner,

v.

DANIEL VASQUEZ, Warden of the California State Prison at San Quentin,

Respondent.

**DEATH PENALTY CASE**
**EXECUTION IMMINENT**
**[Execution Date: Oct. 11, 1994]**

**REQUEST BY PRISONER FOR APPOINTMENT OF COUNSEL IN CALIFORNIA DEATH SENTENCE CASE AND FOR STAY OF EXECUTION OF DEATH SENTENCE**

Pursuant to Local Rules 296-4 (a) and 296-8 (b), I, GUY KEVIN ROWLAND, request that this Court appoint qualified counsel to represent me in federal habeas proceedings that will be initiated on my behalf to seek relief from the judgment of death imposed against me by the San Mateo County Superior Court.

For the appointment, I further request that the Court stay execution of my sentence, scheduled for October 11, 1994, and all court and other proceedings related to execution of that sentence, including preparations for the execution and the setting of a new execution date, for 45 days from the scheduled execution date.

In the event that counsel is not appointed to represent me within the period of the initial stay of execution, I request that additional stays of execution be ordered as needed, and I authorize any member of the Selection Board for the Northern District, or any attorney designated by the Selection Board for this purpose, to request such further stays of execution on my behalf until the Court appoints counsel to represent me.

///

This request is based on my attached declaration.

Dated: August 15, 1994 Respectfully submitted,

Guy K. Rowland

GUY KEVIN ROWLAND

COLLEEN M. ROHAN
Attorney at Law
P.O. Box 411165
San Francisco, CA 94141-1165
Telephone: (415) 826-2577

ROBERT NAVARRO
Attorney at Law
40 Santa Clara Avenue
San Francisco, CA 94127-1518
Telephone: (415) 759-8900

Attorneys for Petitioner
GUY KEVIN ROWLAND

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| GUY KEVIN ROWLAND<br><br>Petitioner,<br><br>v.<br><br>ARTHUR CALDERON, Warden of the California State Prison at San Quentin,<br><br>Respondent. | No. C-94-3037-EFL<br><br>EX PARTE APPLICATION FOR TEMPORARY STAY OF EXECUTION TO PERMIT PREPARATION OF HABEAS CORPUS PETITION<br><br>DEATH PENALTY CASE |

TO: THE HONORABLE EUGENE F. LYNCH, UNITED STATES DISTRICT COURT JUDGE, NORTHERN DISTRICT OF CALIFORNIA:

Petitioner GUY KEVIN ROWLAND, through is attorneys, Colleen Rohan and Robert Navarro, hereby applies pursuant to Rule 296-8(a) of the Local rules of the United States District Court for the Northern District of California, for an extension of the stay of petitioner's execution for 120 days through and including October 8, 1995, to allow newly-appointed counsel time in which to prepare and file a

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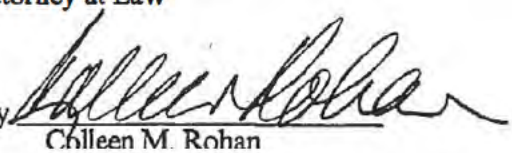
habeas corpus petition in this Court. This motion is based on the attached memorandum and specification of non-frivolous issues.

DATED: June 17, 1995

Respectfully submitted,

COLLEEN M. ROHAN
Attorney at Law

ROBERT NAVARRO
Attorney at Law

By 
Colleen M. Rohan

Attorneys for Petitioner
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Attorneys for Petitioner
GUY KEVIN ROWLAND

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

GUY KEVIN ROWLAND

Petitioner,

v.

ARTHUR CALDERON, Warden of California State Prison at San Quentin,

Respondent.

No. C-94-3037-EFL

MEMORANDUM IN APPLICATION FOR TEMPORARY STAY OF EXECUTION; SPECIFICATION OF NON-FRIVOLOUS ISSUES

DEATH PENALTY CASE

A. Grounds for Application

Petitioner has previously filed an application for a stay of execution and a motion for appointment of counsel, with this court, which indicated that his state court attorneys, Andrew Weill and Robert Navarro, were unavailable to represent him as lead counsel in federal court. Thereafter this court issued a stay of petitioner's execution while counsel was sought in this case.

On May 5, 1995 this court appointed Colleen M. Rohan as lead counsel and Robert Navarro as second counsel to represent petitioner, pursuant to the recommendation of the Selection Board for the United States District Court for the Northern District of California.

Prior to her appointment, lead counsel was unfamiliar with the record and issues in this case.

Since her appointment, lead counsel has received only a portion of the record in petitioner's case.

Having consulted with second counsel, Mr. Navarro, who is familiar with this case, but not yet having received or reviewed the entire record, the undersigned lead counsel believes that petitioner's case raises numerous substantial federal constitutional issues calling into question the validity of the guilt and penalty verdicts and the propriety of the death judgment. Those issues presently known to counsel are set forth in the following specification of non-frivolous issues.

Counsel requests that this court grant a stay of 120 days to permit her to obtain and review the entire trial and appellate record, to identify all potential federal constitutional issues suggested herein, to investigate factual issues calling into question the validity of the convictions and sentence, and to prepare and file a habeas corpus petition raising the issues specified herein as well as those that are revealed in the course of counsel's investigation and review of the record.

B. Specification of Non-Frivolous Issues

Counsel specifies the following issues as a partial list of non-frivolous federal constitutional issues presented in petitioner's case:

1) Petitioner's death judgment was unlawfully and unconstitutionally imposed in violation of rights guaranteed under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution in that after entry of the judgment and conviction in this case, and imposition of the death sentence, petitioner learned for the first time that one of his two trial counsel, Charles C. Pierpoint, had an ongoing conflict of interest with petitioner throughout the proceedings in the trial court.

Specifically, it was discovered that Detective Mifflin Singleton, the chief investigating officer who worked with the prosecution throughout the trial court proceedings against petitioner, had a long standing professsional and personal relationship with petitioner's trial counsel, Mr. Pierpoint, which was never revealed to petitioner. Among other matters, Mr. Pierpoint, who had previously worked with Detective Singleton when Mr. Pierpoint was a San Mateo County deputy district attorney, had represented Detective Singleton in forming a partnership and in a personal injury suit which was in active litigation during petitioner's case, and which required numerous appearances on behalf of Detective Singleton.

In addition, it was discovered, that Clifford V. Cretan, Mr. Pierpoint's partner in the firm of Thirkell, Cretan and Pierpoint, had represented Detective Singleton in a dissolution of marriage action.

Petitioner was never informed about any aspect of the relationship between Detective Singleton and Mr. Pierpoint and his firm. Had he been so informed, petitioner would have considered the dual representation to be a conflict of interest.

The undivided loyalty of counsel is essential to due process of law. United States v. Alvarez, 580 F.2d 1251 (5th Cir., 1978). Moreover, a conflict of interest between the defendant and his or her lawyer undermines that defendant's constitutional right to the effective assistance of counsel. When counsel's loyalty to one client is threatened by obligations owed to another client, a conflict of interest has arisen. Wood v. Georgia, 450 U.S. 261, 271 (1981) [The right to effective assistance of counsel includes the right to representation that is free from conflicts of interest.]; Cuyler v. Sullivan, 446 U.S. 335, 344-345 (1980) [right to conflict free counsel applies to appointed counsel as well as retained.]

An attorney who cross-examines a former or current client inherently encounters divided loyalties. Porter v. Wainwright, 803 F.2d 930 (11th Cir., 1986). Concurrent representation of the defendant and an adverse witness or a hostile party places the attorney in a situation where he is forced to balance the zeal of his defense of the accused against any solicitude for his client, the witness or hostile party. This situation is deemed inherently conducive to divided loyalties and, therefore, as a matter of law, a real conflict of interest is said to exist. Castillo v. Estelle, 504 F.2d 1243 (5th Cir., 1974).

Moreover, a factor which must be examined carefully is the attorney's pecuniary interest in possible future business from the witness/client which causes the attorney to avoid vigorous cross-examination that may be embarrassing or offense to the witness/client. United States v. Jeffers, 520 F.2d 1256 (7th Cir., 1975).

Once a conflict of interest is established, a showing of actual prejudice is not required. To establish that a conflict adversely affected counsel's performance the defendant need only show that some effect on counsel's handling of particular aspects of the trial was "likely." United States v. Miskins, 966 F.2d 1263, 1268 (9th Cir., 1992).

In this case petitioner's trial counsel was compromised in his defense of petitioner's case by the

fact that Detective Singleton was a long time friend, and that he had various active cases with counsel and counsel's law firm.

2) Petitioner's trial attorneys rendered ineffective assistance of counsel at the penalty phase of his trial in violation of petitioner's rights pursuant to the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

Specifically, petitioner's trial attorneys failed to fully and adequately investigate and prepare his case in mitigation regarding the (a) possible diagnosis of petitioner as a person suffering from organic brain disorder; and (b) the effect of numerous childhood accidents and violent, physical abuse on petitioner's mental health status. Counsel also failed to adequately prepare the retained expert witness for his testimony at the penalty phase of petitioner's trial, and failed to retain and prepare other needed expert witnesses.

The Sixth Amendment right to counsel serves to protect the defendant's fundamental right to a fair trial. Strickland v. Washington, 466 U.S. 668, 684 (1984). Without effective counsel the right to a trial itself would be "of little avail." United States v. Cronic, 466 U.S. 648, 653 (1984); Powell v. Alabama (1932) 287 U.S. 45, 68-69. Evidence which demonstrates that trial counsel's conduct fell below the objective standard of reasonableness under prevailing professional norms, contemporaneously demonstrates that counsel's conduct inexcusably rendered the trial unfair and serves to undermine the reliability of the verdict. Nix v. Whiteside (1986) 475 U.S. 157, 167.

In petitioner's case counsel simply failed to adequately investigate and present a potentially meritorious psychiatric defense at the guilt or penalty phase of trial. Under the prevailing legal test, counsel's performance was deficient, served to undermine confidence in the reliability of the guilt or penalty phase verdict and requires reversal of the convictions and death sentence.

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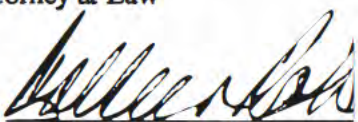
Based on the foregoing, petitioner respectfully requests that this Court issue an order extending the stay of execution for one hundred and twenty (120) days to and including October 8, 1995, to permit the preparation and filing of a habeas corpus petition by newly-appointed counsel.

DATED: June 17, 1995

Respectfully submitted,

COLLEEN M. ROHAN
Attorney at Law

ROBERT NAVARRO
Attorney at Law

By 
Colleen M. Rohan

Attorneys for Petitioner
GUY KEVIN ROWLAND

# U.S. District Court
# California Northern District (San Francisco)
# CIVIL DOCKET FOR CASE #: 3:94-cv-03037-WHA

Rowland v. Martel, et al.
Assigned to: Hon. William Alsup
Referred to: DPSA JBD
Demand: $0
Cause: 28:2254 Ptn for Writ of H/C - Stay of Execution

Date Filed: 08/26/1994
Date Terminated: 10/02/2012
Jury Demand: None
Nature of Suit: 535 Death Penalty - Habeas Corpus
Jurisdiction: Federal Question

**Petitioner**

**Guy Kevin Rowland**

represented by **Michael Robert Levine**
400 S.W. Sixth Avenue
Portland, OR 97204
503-546-3927
Email: michael@levinemchenry.com
*LEAD ATTORNEY*
*ATTORNEY TO BE NOTICED*

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Email: crohan@attglobal.net
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**Miscellaneous**

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**Miscellaneous**

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docketingsfawtc@doj.ca.gov
Email: docketing@capsf.org
PRO SE

| Date Filed | # | Docket Text |
|---|---|---|
| 08/26/1994 | 1 | PETITION FOR WRIT OF HABEAS CORPUS (no process) Fee status ifpp entered on 8/26/94 () ; [3:94-cv-03037] (dcap, COURT STAFF) (Entered: 09/01/1994) |
| 08/26/1994 | 7 | DECLARATION by Guy Kevin Rowland on behalf of Plaintiff re habeas corpus petition [1-1] [3:94-cv-03037] (mcl, COURT STAFF) (Entered: 01/05/1995) |
| 08/29/1994 | 2 | ORDER by Judge Eugene F. Lynch staying execution for 45 days, up to & incl 11/25/94 ; case referred to the Selection Board for the U.S. District Court, N. CA, for suggestion of one or more counsel to be appointed to represent petitioner ( Date Entered: 9/6/94) (cc: all counsel and writ clerk) [3:94-cv-03037] (mcl, COURT STAFF) (Entered: 09/06/1994) |
| 11/16/1994 | | RECEIVED Application for Extension of Stay of Execution and proposed order submitted by Plaintiff Guy Kevin Rowland [3:94-cv-03037] (fs, COURT STAFF) (Entered: 11/18/1994) |
| 11/21/1994 | 4 | ORDER by Judge Eugene F. Lynch granting application [3-1] ; execution of death sentence upon Guy Kevin Rowland be stayed for an additional 45 days, up to & incl 1/9/95. ( Date Entered: 11/22/94) (cc: all counsel and writ clerk) [3:94-cv-03037] (mcl, COURT STAFF) (Entered: 11/22/1994) |
| 11/21/1994 | 3 | APPLICATION by Plaintiff Guy Kevin Rowland for extension of stay of execution of sentence up to & incl 1/9/95 [3:94-cv-03037] (mcl, COURT |

| | | |
|---|---|---|
| | | STAFF) (Entered: 11/22/1994) |
| 01/04/1995 | 5 | APPLICATION by Plaintiff Guy Kevin Rowland for extension of stay of execution of sentence and any related proceedings [3:94-cv-03037] (mcl, COURT STAFF) (Entered: 01/05/1995) |
| 01/04/1995 | 6 | PROOF OF SERVICE by Plaintiff Guy Kevin Rowland of document no. 5 and proposed Order [3:94 cv-03037] (mcl, COURT STAFF) (Entered: 01/05/1995) |
| 01/06/1995 | 8 | ORDER by Judge Saundra B. Armstrong granting application [5-1] ; execution of sentence of death imposed upon Guy Kevin Rowland and any related proceedings be stayed for an additional 45 days, up to & incl 2/23/95 ( Date Entered: 1/11/95) (cc: all counsel and writ clerk) [3:94-cv-03037] (mcl, COURT STAFF) (Entered: 01/11/1995) |
| 02/21/1995 | | RECEIVED Order for extension of stay of execution of sentence ( Plaintiff Guy Kevin Rowland ) re: [9-1] [3:94-cv-03037] (mcl, COURT STAFF) (Entered: 02/21/1995) |
| 02/21/1995 | 9 | APPLICATION by Plaintiff Guy Kevin Rowland for extension of stay of execution of sentence and any related proceedings [3:94-cv-03037] (mcl, COURT STAFF) (Entered: 02/21/1995) |
| 02/22/1995 | 10 | ORDER by Judge Eugene F. Lynch granting application [9-1] ; execution of sentence stayed for an additional 45 days, up to & incl 4/9/95 ( Date Entered: 2/23/95) (cc: all counsel and writ clerk) [3:94-cv-03037] (mcl, COURT STAFF) (Entered: 02/23/1995) |
| 04/04/1995 | 12 | LETTER dated 4/4/95 from Michael G. Millman re recommendation of counsel for appointment [3:94-cv-03037] (mcl, COURT STAFF) (Entered: 04/07/1995) |
| 04/04/1995 | | RECEIVED Order appointing counsel ( Plaintiff Guy Kevin Rowland ) [3:94-cv-03037] (mcl, COURT STAFF) (Entered: 04/04/1995) |
| 04/04/1995 | 11 | APPLICATION by Plaintiff Guy Kevin Rowland for extension of stay of execution of sentence and any related proceedings [3:94-cv-03037] (mcl, COURT STAFF) (Entered: 04/04/1995) |
| 04/07/1995 | 13 | ORDER by Judge Eugene F. Lynch granting application [11-1] ; execution of death sentence upon Guy Kevin Rowland be STAYED for an additional 30 days up to & incl 5/9/95 ( Date Entered: 4/11/95) (cc: all counsel) [3:94-cv-03037] (mcl, COURT STAFF) (Entered: 04/11/1995) |
| 05/05/1995 | 16 | ORDER by Judge Eugene F. Lynch granting application [14-1] ; execution of death sentence stayed for an additional 30 days up to & incl 6/8/95 ( Date Entered: 5/8/95) (cc: all counsel) [3:94-cv-03037] (mcl, COURT STAFF) (Entered: 05/08/1995) |
| 05/05/1995 | 15 | ORDER by Judge Eugene F. Lynch for appointment of counsel - upon recommendation of Selection Board for the U.S. District Court, N. CA, Colleen Mary Rohan and Robert Navarro are appointed to represent petitioner |

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| | | ( Date Entered: 5/8/95) (cc: all counsel) [3:94-cv-03037] (mcl, COURT STAFF) (Entered: 05/08/1995) |
| 05/05/1995 | 14 | APPLICATION by Plaintiff Guy Kevin Rowland for extension of stay of execution of sentence [3:94-cv-03037] (mcl, COURT STAFF) (Entered: 05/05/1995) |
| 05/30/1995 | | RECEIVED Order ( Plaintiff Guy Kevin Rowland ) re: [17-1] [3:94-cv-03037] (mcl, COURT STAFF) (Entered: 06/01/1995) |
| 05/30/1995 | 17 | APPLICATION by Plaintiff Guy Kevin Rowland for additional 30 days' extension of stay of execution of sentence and any related proceedings [3:94-cv-03037] (mcl, COURT STAFF) (Entered: 06/01/1995) |
| 05/31/1995 | 18 | ORDER by Judge Eugene F. Lynch granting application [17-1] extending stay of execution for an additional 30 days, up to & incl 7/8/95 ( Date Entered: 6/1/95) (cc: all counsel) [3:94-cv-03037] (mcl, COURT STAFF) (Entered: 06/01/1995) |
| 06/19/1995 | 19 | EX-PARTE APPLICATION before Judge Eugene F. Lynch by Plaintiff Guy Kevin Rowland for temporary stay of execution to permit preparation of habeas corpus petition [3:94-cv-03037] (mcl, COURT STAFF) (Entered: 06/21/1995) |
| 06/19/1995 | 20 | MEMORANDUM by Plaintiff Guy Kevin Rowland in support of motion for temporary stay of execution to permit preparation of habeas corpus petition [19-1] [3:94-cv-03037] (mcl, COURT STAFF) (Entered: 06/21/1995) |
| 06/19/1995 | | RECEIVED Order granting stay of execution ( Plaintiff Guy Kevin Rowland ) re: [19-1] [3:94-cv-03037] (mcl, COURT STAFF) (Entered: 06/21/1995) |
| 06/26/1995 | 21 | ORDER by Judge Eugene F. Lynch granting motion for temporary stay of execution to permit preparation of habeas corpus petition [19-1] ; execution stayed for 60 days up to & incl 8/8/95 ( Date Entered: 6/27/95) (cc: all counsel) [3:94-cv-03037] (mcl, COURT STAFF) (Entered: 06/27/1995) |
| 07/24/1995 | 22 | NOTICE by Plaintiff Guy Kevin Rowland of change of address of counsel : Robert Navarro, 419 Merlot Drive, Cloverdale, CA 95425 ; tel. no. (707) 894-9311 [3:94-cv-03037] (mcl, COURT STAFF) (Entered: 07/24/1995) |
| 08/01/1995 | | RECEIVED Order for stay of execution ( Plaintiff Guy Kevin Rowland ) re: [23-1] [3:94-cv-03037] (mcl, COURT STAFF) (Entered: 08/01/1995) |
| 08/01/1995 | 24 | DECLARATION by Colleen M. Rohan on behalf of Plaintiff Guy Kevin Rowland re motion for temporary stay of execution to permit preparation of habeas corpus petition [23-1] [3:94-cv-03037] (mcl, COURT STAFF) (Entered: 08/01/1995) |
| 08/01/1995 | 23 | EX-PARTE APPLICATION before Judge Eugene F. Lynch by Plaintiff Guy Kevin Rowland for temporary stay of execution to permit preparation of habeas corpus petition [3:94-cv-03037] (mcl, COURT STAFF) (Entered: 08/01/1995) |
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| 08/02/1995 | 26 | ORDER by Judge Eugene F. Lynch granting petitioner's exparte application for temporary stay of execution to permit preparation of habeas corpus petition [23-1] staying execution of sentence for 120 days, up to & incl 12/8/95 ( Date Entered: 8/3/95) (cc: all counsel) [3:94-cv-03037] (mcl, COURT STAFF) (Entered: 08/03/1995) |
| 08/02/1995 | 25 | COURTROOM DEPUTIES' CHECKLIST re stays of execution or extensions of stay [3:94-cv-03037] (mcl, COURT STAFF) (Entered: 08/03/1995) |
| 08/03/1995 | 27 | LETTER dated 8/2/95 from Robert Navarro re change of address to : 419 Merlot Drive, Cloverdale, CA 95425 ; tel. no. (707) 894-9311, effective 8/5/95 and submission of request for investigation funds under seal by 8/18/95 [3:94-cv-03037] (mcl, COURT STAFF) (Entered: 08/04/1995) |
| 08/21/1995 | 29 | EX-PARTE APPLICATION before Judge Eugene F. Lynch by Plaintiff Guy Kevin Rowland FILED UNDER SEAL [3:94-cv-03037] (mcl, COURT STAFF) (Entered: 08/21/1995) |
| 08/21/1995 | | EX-PARTE APPLICATION before Judge Eugene F. Lynch by Plaintiff Guy Kevin Rowland FILED UNDER SEAL [3:94-cv-03037] (mcl, COURT STAFF) (Entered: 08/21/1995) |
| 08/21/1995 | 28 | ORDER by Judge Eugene F. Lynch sealing petitioner's exparte application ... ( Date Entered: 8/21/95) (cc: all counsel) [3:94-cv-03037] (mcl, COURT STAFF) (Entered: 08/21/1995) |
| 08/29/1995 | 30 | MINUTES: ( C/R none) Telephonic status conference held [3:94-cv-03037] (mcl, COURT STAFF) (Entered: 08/31/1995) |
| 09/07/1995 | 31 | ORDER by Judge Eugene F. Lynch FILED UNDER SEAL ( Date Entered: 9/7/95) (cc: all counsel) [3:94-cv-03037] (mcl, COURT STAFF) (Entered: 09/07/1995) |
| 12/08/1995 | 32 | EX-PARTE APPLICATION by Plaintiff/Petitioner Guy Kevin Rowland for an order for stay of execution until final disposition of petitioner's habeas proceedings in this court [3:94-cv-03037] (tn, COURT STAFF) (Entered: 12/09/1995) |
| 12/15/1995 | 34 | MINUTES: ( C/R none) granting petitioner's exparte application for stay of execution until final disposition of petitioner's habeas proceedings, final petition to be filed by 6/17/96 [3:94-cv-03037] (mcl, COURT STAFF) (Entered: 12/19/1995) |
| 12/15/1995 | 33 | ORDER by Judge Eugene F. Lynch denying petitioner's application for an order for stay of execution until final disposition of petitioner's habeas proceedings in this court [32-1] staying execution up to & incl 6/17/96 and petitioner shall file his substantive petition for habeas relief by 6/17/96 ( Date Entered: 12/19/95) (cc: all counsel) [3:94-cv-03037] (mcl, COURT STAFF) (Entered: 12/19/1995) |
| 12/22/1995 | 37 | EX-PARTE APPLICATION before Judge Eugene F. Lynch by Plaintiff Guy Kevin Rowland for order FILED UNDER SEAL [3:94-cv-03037] (mcl, |

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| | | COURT STAFF) (Entered: 12/27/1995) |
| 12/22/1995 | 36 | ORDER by Judge Eugene F. Lynch granting application [35-1] ( Date Entered: 12/27/95) (cc: all counsel) [3:94-cv-03037] (mcl, COURT STAFF) (Entered: 12/27/1995) |
| 12/22/1995 | | RECEIVED Order re exparte application ( Plaintiff Guy Kevin Rowland ) re: [35-1] [3:94-cv-03037] (mcl, COURT STAFF) (Entered: 12/27/1995) |
| 12/22/1995 | 35 | APPLICATION by Plaintiff Guy Kevin Rowland to file funding request under seal [3:94-cv-03037] (mcl, COURT STAFF) (Entered: 12/27/1995) |
| 01/10/1996 | 38 | ORDER by Judge Eugene F. Lynch FILED UNDER SEAL ( Date Entered: 1/11/96) (cc: all counsel) [3:94-cv-03037] (mcl, COURT STAFF) (Entered: 01/11/1996) |
| 01/16/1996 | 39 | LETTER dated 1/12/96 from Colleen Mary Rohan re citation re motion for requested funds [3:94-cv-03037] (mcl, COURT STAFF) (Entered: 01/18/1996) |
| 06/14/1996 | 44 | DECLARATION by Robert Navarro on behalf of Plaintiff Guy Kevin Rowland re application [40-1] [3:94-cv-03037] (mcl, COURT STAFF) (Entered: 06/18/1996) |
| 06/14/1996 | 43 | PROOF OF SERVICE by Plaintiff Guy Kevin Rowland of application [40-1] [3:94-cv-03037] (mcl, COURT STAFF) (Entered: 06/17/1996) |
| 06/14/1996 | 42 | DECLARATION by Colleen Rohan on behalf of Plaintiff Guy Kevin Rowland re application [40-1] [3:94-cv-03037] (mcl, COURT STAFF) (Entered: 06/17/1996) |
| 06/14/1996 | 41 | ORDER by Judge Susan Illston granting application [40-1] counsel are to file the petition for writ of habeas corpus on 6/28/96, stay of execution extended to 6/28/96 ( Date Entered: 6/17/96) (cc: all counsel) [3:94-cv-03037] (mcl, COURT STAFF) (Entered: 06/17/1996) |
| 06/14/1996 | 40 | APPLICATION by Plaintiff Guy Kevin Rowland for eleven day extension of time in which to file petition for writ of habeas corpus and for eleven day extension of stay of execution [3:94 cv 03037] (mcl, COURT STAFF) (Entered: 06/17/1996) |
| 06/28/1996 | 46 | PETITION FOR WRIT OF HABEAS CORPUS filed by petitioner Guy Kevin Rowland [3:94-cv-03037] (mcl, COURT STAFF) (Entered: 06/28/1996) |
| 06/28/1996 | | RECEIVED Proposed Order ( Plaintiff Guy Kevin Rowland ) re: motion for stay of execution pending the final disposition of petitioner's writ of habeas corpus [45-1] [3:94-cv-03037] (mcl, COURT STAFF) (Entered: 06/28/1996) |
| 06/28/1996 | 45 | EX-PARTE APPLICATION before Judge Eugene F. Lynch by Plaintiff Guy Kevin Rowland for stay of execution pending the final disposition of petitioner's writ of habeas corpus [3:94-cv-03037] (mcl, COURT STAFF) (Entered: 06/28/1996) |
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| 07/02/1996 | | Docket Modification (Administrative) to order [47-2] GRANTING petitioner's ex parte application for stay of execution pending the final disposition of petitioner's writ of habeas corpus [45-1] [3:94-cv-03037] (lcc, COURT STAFF) (Entered: 03/04/1998) |
| 07/02/1996 | 47 | ORDER by Judge Eugene F. Lynch that the execution of the death sentence of plaintiff and any related proceedings be STAYED indefinitely pending the final disposition of plaintiff's writ of habeas corpus ( Date Entered: 7/3/96) (cc: all counsel) [3:94-cv-03037] (mcl, COURT STAFF) (Entered: 07/03/1996) |
| 07/19/1996 | 48 | CERTIFICATE by Plaintiff Guy Kevin Rowland of informed consent for the filing of a petition for writ of habeas corpus [3:94-cv-03037] (mcl, COURT STAFF) (Entered: 07/24/1996) |
| 08/08/1996 | 49 | MINUTES: ( C/R Judith Dudeck) Telephonic conference call with Judge Lynch ; defendant to submit further briefs by 8/16/96 ; plaintiff to submit briefs by 8/30/96 ; petitioner's counsel waives appearance of Rowland [3:94-cv-03037] (mcl, COURT STAFF) (Entered: 08/09/1996) |
| 08/12/1996 | | RECEIVED Proposed Order ( Plaintiff Guy Kevin Rowland ) FILED UNDER SEAL [3:94-cv-03037] (mcl, COURT STAFF) (Entered: 08/13/1996) |
| 08/12/1996 | 51 | DECLARATION by Hugh W. Ridlehuber on behalf of Plaintiff Guy Kevin Rowland FILED UNDER SEAL [3:94-cv-03037] (mcl, COURT STAFF) (Entered: 08/13/1996) |
| 08/12/1996 | 50 | EX-PARTE APPLICATION before Judge Eugene F. Lynch by Plaintiff Guy Kevin Rowland FILED UNDER SEAL [3:94-cv-03037] (mcl, COURT STAFF) (Entered: 08/13/1996) |
| 08/12/1996 | 52 | DECLARATION by Robert Navarro on behalf of Plaintiff Guy Kevin Rowland FILED UNDER SEAL [3:94-cv-03037] (mcl, COURT STAFF) Modified on 08/13/1996 (Entered: 08/13/1996) |
| 08/13/1996 | 53 | NOTICE by defendant of lodging and index of records (4 boxes) [3:94-cv-03037] (mcl, COURT STAFF) (Entered: 08/15/1996) |
| 08/15/1996 | | Docket Modification (Administrative) to order [54-1] VACATING [50-1] motion FILED UNDER SEAL [3:94-cv-03037] (lcc, COURT STAFF) (Entered: 03/04/1998) |
| 08/15/1996 | 54 | ORDER by Judge Eugene F. Lynch re application for investigation and consultant funds : petitioner's exparte application for funds filed 8/12/96 and its suporting materials shall not be considered ; petitioner may refile the application in compliance with newly amended legislation (see Order) ( Date Entered: 8/16/96) (cc: all counsel) [3:94-cv-03037] (mcl, COURT STAFF) (Entered: 08/16/1996) |
| 08/16/1996 | 55 | VERIFICATION of petition for writ of habeas corpus by Plaintiff Guy Kevin Rowland [3:94-cv-03037] (mcl, COURT STAFF) (Entered: 08/19/1996) |
| 08/26/1996 | | RECEIVED Proposed Order ( defendant) re: motion to compel exhaustion of |

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| | | COURT STAFF) (Filed on 9/11/2007) (Entered: 09/12/2007) |
| 10/29/2007 | 213 | Third Amended PETITION for Writ of Habeas Corpus. Filed by Guy Kevin Rowland. (Levine, Michael) (Filed on 10/29/2007) Modified on 10/30/2007 (jlm, COURT STAFF). (Entered: 10/29/2007) |
| 11/19/2007 | 214 | THIRD AMENDED PETITION for Writ of Habeas Corpus *(corrected)* Filed by Guy Kevin Rowland. (Levine, Michael) (Filed on 11/19/2007) Modified on 11/20/2007 (jlm, COURT STAFF). (Entered: 11/19/2007) |
| 12/11/2007 | 215 | MOTION for Extension of Time to File Answer filed by Steven W. Ornoski. (Lustre, Alice) (Filed on 12/11/2007) (Entered: 12/11/2007) |
| 12/11/2007 | 216 | Declaration of Alice B. Lustre *IN SUPPORT OF 215 EX PARTE APPLICATION FOR EXTENSION OF TIME TO FILE AMENDED ANSWER* filed by Steven W. Ornoski. (Lustre, Alice) (Filed on 12/11/2007) Modified on 12/12/2007 (kc, COURT STAFF). (Entered: 12/11/2007) |
| 12/11/2007 | 217 | Proposed Order *GRANTING 215 EXTENSION OF TIME TO FILE AMENDED ANSWER* by Steven W. Ornoski. (Lustre, Alice) (Filed on 12/11/2007) Modified on 12/12/2007 (kc, COURT STAFF). (Entered: 12/11/2007) |
| 12/13/2007 | 218 | ORDER by Judge ARMSTRONG granting 215 Motion for Extension of Time to Answer (lrc, COURT STAFF) (Filed on 12/13/2007) (Entered: 12/13/2007) |
| 12/21/2007 | 219 | NOTICE of Change of Address by Michael David Laurence *Habeas Corpus Resource Center* (Laurence, Michael) (Filed on 12/21/2007) (Entered: 12/21/2007) |
| 12/21/2007 | 220 | NOTICE of Change of Address by Habeas Corpus Resource Center (jlm, COURT STAFF) (Filed on 12/21/2007) (Entered: 12/27/2007) |
| 02/08/2008 | 221 | MOTION for Extension of Time to File Answer to Third Amended Petition, filed by Robert L. Ayers. (Attachments: # 1 Declaration of Alice B. Lustre in Support of Ex Parte Application for Extension of Time to File Answer to Third Amended Petition, # 2 Proposed Order)(Lustre, Alice) (Filed on 2/8/2008) Modified on 2/11/2008 (jlm, COURT STAFF). (Entered: 02/08/2008) |
| 02/12/2008 | 222 | ORDER by Judge ARMSTRONG granting 221 Motion for Extension of Time to Answer. Respondent's Amended Answer due 02/22/08. (lrc, COURT STAFF) (Filed on 2/12/2008) Modified on 2/13/2008 (jlm, COURT STAFF). (Entered: 02/12/2008) |
| 02/19/2008 | 223 | MOTION for Extension of Time to File Answer to Third Amended Petition, filed by Robert L. Ayers. (Lustre, Alice) (Filed on 2/19/2008) Modified on 2/20/2008 (jlm, COURT STAFF). (Entered: 02/19/2008) |
| 02/19/2008 | 224 | Declaration of Alice B. Lustre in Support re 223 *Motion for Extension of Time to File Answer to Third Amended Petition* filed by Robert L. Ayers. (Lustre, Alice) (Filed on 2/19/2008) Modified on 2/20/2008 (jlm, COURT STAFF). (Entered: 02/19/2008) |

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| | | (Attachments: # 1 Certificate/Proof of Service)(dt, COURT STAFF) (Filed on 10/2/2012) (Entered: 10/02/2012) |
| 10/02/2012 | 274 | JUDGMENT. Signed by Judge William Alsup on 10/2/12. (Attachments: # 1 Certificate/Proof of Service)(dt, COURT STAFF) (Filed on 10/2/2012) (Entered: 10/02/2012) |
| 10/11/2012 | 275 | MOTION for Leave to Appeal in forma pauperis *on appeal* filed by Guy Kevin Rowland. (Levine, Michael) (Filed on 10/11/2012) (Entered: 10/11/2012) |
| 10/11/2012 | 276 | NOTICE OF APPEAL to the 9th CCA Guy Kevin Rowland. (IFP Request was previously e-filed with the Court). (Levine, Michael) (Filed on 10/11/2012) (Entered: 10/11/2012) |
| 10/11/2012 | 277 | Transmission of Notice of Appeal and Docket Sheet to US Court of Appeals by Guy Kevin Rowland re 276 Notice of Appeal (Attachments: # 1 Docket) (dtm, COURT STAFF) (Filed on 10/11/2012) (Entered: 10/11/2012) |
| 11/06/2012 | 278 | ORDER of USCA **Case No 12-99004** as to 276 Notice of Appeal filed by Guy Kevin Rowland (dtmS, COURT STAFF) (Filed on 11/6/2012) (Entered: 11/06/2012) |
| 04/22/2013 | 279 | ORDER of USCA Case **12-99004** as to 276 Notice of Appeal filed by Guy Kevin Rowland (dtmS, COURT STAFF) (Filed on 4/22/2013) (Entered: 04/23/2013) |
| 06/17/2013 | 280 | ORDER of USCA Case **12-99004** as to 276 Notice of Appeal filed by Guy Kevin Rowland (dtmS, COURT STAFF) (Filed on 6/17/2013) (Entered: 06/17/2013) |
| 09/25/2013 | 281 | **ORDER GRANTING APPLICATION TO PROCEED IN FORMA PAUPERIS ON APPEAL by Judge William Alsup granting 275 Motion for Leave to Appeal in forma pauperis (dt, COURT STAFF) (Filed on 9/25/2013) (Additional attachment(s) added on 9/25/2013: # 1 Certificate/Proof of Service) (dt, COURT STAFF). (Entered: 09/25/2013)** |

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